United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,901

856

PEARLE STUSS,

Appellant,

v.

PRESTON SHELLY, ET AL.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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APPELLANT'S STATEMENT OF QUESTIONS PRESENTED

I.

Did counsel for appellees commit harmful error by setting up a fiction in respect to appellant's claims by stating to the jury in his opening statement that the appellant claimed to have a varicosed vein requiring surgical removal as the result of negligence of the appellees and that the jury would have to decide whether or not the varicosed vein problem was caused by the negligence of the appellees when in fact there was no evidence of a marked pathological varicose condition and the appellant had not advanced such a claim prior to or at trial?

II.

Did the trial court, liability having been admitted, commit harmful error in refusing to permit counsel for the appellant to interrogate the appellant on direct examination concerning the circumstances under which she was injured in sufficient detail to permit the jury to be informed adequately and properly concerning the severity and nature of the impact which caused her the injuries of which she complained and in rebuking her counsel in the presence of the jury in counsel's attempt to present said evidence?

III.

Did the trial court commit harmful error in stating in the presence of the jury that the removal of the greater sapphanous vein of the left leg of the appellant had nothing to do with this case when in fact the competent testimony of the doctor who removed the vein was that the subperiosteal hematoma proximately resulting from the negligence of the defendants required surgical removal and was in the course of the greater sapphanous vein and that it was the wiser medical procedure to remove the vein, and that he would not have removed the vein except for the location of the hematoma in the course of the vein?

IV.

Did the trial court commit harmful error in refusing to allow counsel for the appellant to interrogate the doctor who had surgically removed the greater sapphanous vein of the left leg of the appellant concerning the effect of the removal of the vein as a cause of pain in the leg and on the circulatory system of the appellant whose occupation required her to be on her feet a great deal of the time?

V.

Did the trial court commit error in refusing to admit into evidence the hospital records although they were material and relevant and their admission without formal proof had been stipulated to at pretrial?

VI.

Did the trial court abuse its discretion in refusing to grant a new trial on the grounds that the verdict was inadequate?

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No. 17,901

PEARLE STUSS,

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Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The appellant and appellees, at the time the suit was filed in the District Court for the District of Columbia, were adult residents of the District of Columbia and citizens of the United States, the cause of action sounded in tort, and the amount in controversy exceeded $10,000.00 exclusive of interest and costs.

The U. S. District Court for the District of Columbia originally had jurisdiction of this case under Title II, Section 306 of the D. C. Code, 1951 Edition, and this Court has jurisdiction under Title 28, Section 1291, U.S.C.A.

STATEMENT OF THE CASE

This is an appeal from a jury verdict and judgment in favor of the appellant in the U. S. District Court for the District of Columbia.

The appellant was a tenant and appellees were the owners of the apartment building at 4425 - 14th Street, N.W., Washington, D. C. (J.A. 3) On January 8, 1960, the appellant was seriously, painfully, and permanently injured as a result of the appellees' negligence in that a janitor and building custodian, in the employ of the appellees, acting in the course of his employment in cleaning a common passageway of the apartment building, threw a heavy box of trash from an upper story window at a time when the appellant was standing in the rear yard of the premises about to hang clothes on a clothesline provided by and under the control of the appellees for the common use of the appellant and other tenants, causing said box of trash to strike the appellant on the head and body with such force as to throw her against the upright clothesline support. (J.A. 1, 14) The appellant was then 52 years of age (J.A. 49) and had a pre-existing curvature of the neck and spine. (J.A. 55)

As a result, the appellant was caused traumatic occipital neuralgia, and severe persistent headaches; contusion with hematoma over the upper third of the right radius (J.A. 30), pain (J.A. 35) and numbness of the right arm, sensory loss on the dorsum of the right forearm and slight weakness of the hand grip on the right (J.A. 56), persisting to the present time (J.A. 39); and a subperiosteal hematoma of the left tibia requiring removal by surgery of the hematoma, and of the greater sapphanous vein of the left leg because the hematoma was located in the

course of that vein, with permanent residuals. (J.A. 19, 20, 21, 22, 30, 37, 39, 59)

At trial, counsel for appellees set up a fiction in respect to appellant's claims in his opening statement in that he stated contrary to fact that appellant claimed she was caused to have a varicosed vein requiring surgical removal as the result of the negligence of appellees and then he stated that the jury would have to decide whether or not the varicosed vein problem was caused by the accident. (J.A. 17) In cross-examination of Dr. James Garnett, counsel for appellees asked Dr. Garnett if the injury caused appellant to have a varicosed vein which required surgical removal to which the doctor gave a negative reply. (J.A. 25)

The trial court in the presence of the jury stated that the removal of the vein had nothing to do with this case (J.A. 25) although the uncontradicted and competent testimony of the doctor who removed the vein was that the subperiosteal hematoma which required surgical removal was right in the course of the greater sapphanous vein and that it was the wiser medical course to remove the vein, and that he would not have removed the vein except for the location of the hematoma and that there was no marked pathological varicose condition for which he would otherwise have removed the vein. (J.A. 22)

The trial court refused to allow counsel for the appellant to interrogate Dr. James Garnett, who had surgically removed the vein concerning the effect of the removal of the vein as the cause of pain in the leg and on the circulatory system of the appellant whose occupation required her to be on her feet a great deal of the time (J.A. 27, 28) and refused to admit into evidence hospital records (J.A. 66, 67) although they were material and relevant and their admission without formal proof had been stipulated to at pre-trial. (J.A. 4)

Also at trial, the trial court limited almost to the point of exclusion interrogation of appellant by her counsel of the circumstances

under which she was injured for the reason that appellees had admitted liability, and rebuked counsel in the presence of the jury in his attempt to present such evidence, although the evidence had a direct bearing on medical history and damages. (J.A. 44, 45, 46, 47, 48)

STATEMENT OF POINTS

1. There was error in the court below in that the counsel for appellees in his opening statement wrongfully stated to the jury that the appellant claimed that she was caused to have a varicosed vein requiring surgical removal as the result of the negligence of the appellees when this was in fact not the claim of the appellant and never had been her claim.

2. The trial court erred in refusing to permit counsel for the appellant to interrogate the appellant on direct examination concerning the circumstances under which she was injured in sufficient detail to permit the jury to be informed adequately and properly concerning the severity of the impact which caused her the injuries of which she complained and the colloquy in the presence of the jury between court and counsel in respect to the attempt of counsel to present said evidence was prejudicial to the appellant.

3. The trial court committed error in stating, contrary to the evidence, in the presence of the jury that the removal of the vein had nothing to do with this case when in fact the uncontradicted testimony of the doctor who removed the vein was to the effect that the subperiosteal hematoma which required surgical removal was in the course of the great sapphanous vein, that it was the wiser medical procedure to remove the vein, and that he would not have removed the vein except for the location of the hematoma in the course of the vein.

4. The trial court committed error in refusing to allow counsel for the appellant to interrogate Dr. James Garnett, who had surgically removed the vein, concerning the effect of the removal of the vein on the

circulatory system of the appellant whose occupation required her to be on her feet a great deal of the time.

5. The trial court committed error in refusing to admit into evidence the hospital records although they were material and relevant and their admission without formal proof had been stipulated to at pre-trial.

6. The trial court abused its discretion in refusing to grant a new trial on the ground that the verdict was inadequate.

SUMMARY OF ARGUMENT

The appellees by their counsel set up a fiction in respect to appellant's claims in that counsel for appellees in his opening statement stated contrary to fact that appellant claimed she was caused to have a varicosed vein requiring surgical removal as the result of the negligence of the appellees, an incorrect statement of appellant's claim so closely identified with her claim that it was calculated to and did mislead the court and jury. He then stated that the jury would have to decide whether or not the varicose vein problem was caused by the accident, although appellant had not advanced such a claim prior to or at trial and there was at the trial presented no evidence of a marked pathological varicosed condition. In the course of the trial, counsel for appellees asked Dr. Garnett, appellant's surgeon who had removed the vein, if the injury caused appellant to have a varicosed vein which required surgical removal, to which the doctor gave a negative reply.

The truth of the matter was that the appellant had never claimed that the negligence of the appellees caused her to have a varicosed vein, but did claim that there was permanent loss of the greater sapphanous vein and permanent impairment of the circulatory system and limitation of use of the left leg, and the competent testimony of Dr. James Garnett, the surgeon who removed the vein, was that subperiosteal hematoma

which required surgical removal was in the course of the greater sapphanous vein and it was the wiser medical procedure to remove the vein, and that he would not have removed the vein except for the location of the hematoma in the course of the vein, and that there was no marked pathological varicose condition requiring removal of the vein.

The trial court was led to conclude that the surgical removal of the greater sapphanous vein from the left leg of the appellant had nothing to do with this case, and perpetuated the error by stating in the presence of the jury that the removal of the vein had nothing to do with the case, by refusing to allow counsel for the appellant to interrogate the doctor who had surgically removed the vein concerning the effect of the removal of this vein upon the persistent complaints of the appellant and upon the circulatory system of the appellant whose occupation required her to be on her feet a great deal of the time, and in excluding the hospital records, although their admission without formal proof had been stipulated to at the pre-trial conferences.

In the area where appellant's injuries were to a greater extent subjective but no less severe and no less permanent, in the traumatic occipital neuralgia and severe persistent headaches, in the continued pain in her right arm and left leg, in the loss of sensation on the right dorsum and loss of grip in the right arm, the trial court, by limiting almost to the point of exclusion evidence concerning the circumstances causing appellant's injuries, and by rebuking counsel in his attempt to present such evidence, limited the probative value of appellant's testimony and circumscribed her claims, for the medical opinions were necessarily based upon these same circumstances as a part of the medical history, and the appellees in their attempt to minimize the damages, aggressively pounded upon the proposition that the doctors based their opinions upon the medical history and on what the appellant had told them.

The result was a verdict for the appellant which was grossly inadequate.

ARGUMENT

I.

Counsel for Appellees in His Opening Statement Set Up a Fiction Concerning Appellant's Claim Which He Then Proceeded to Disprove, Misleading the Court and the Jury.

Counsel for appellees, either intentionally or through a misconception of the claim of the appellant, set up a fiction in his opening statement by stating incorrectly that appellant claimed that she was caused to have a varicosed vein requiring surgical removal as the result of the negligence of the appellees (J.A. 17), an incorrect statement of appellant's claim, so closely identified with her claim that it was calculated to and did mislead the court and jury. He then stated that the jury would have to decide whether or not the varicose vein problem was caused by the accident that is the subject matter of this lawsuit (J.A. 17). Counsel for appellees then proceeded to show that the accident did not cause her to have varicose veins requiring an operation (J.A. 24, 25). In fact so effectively did he disprove the fiction that the court concluded and stated that the removal of the vein had nothing to do with the case (J.A. 27) and stated that the appellant's surgeon had so testified (J.A. 28).

The truth of the matter was that the appellant had never claimed that the negligence of the appellees caused her to have a varicosed vein. Appellant did claim that there was permanent loss of the greater sapphanous vein and permanent impairment of the circulatory system and limitation of use of the left leg (pre-trial statement and orders).

Dr. James Garnett, the surgeon who removed the greater sapphanous vein of the left leg of the appellant, was qualified as a witness (J.A. 19), and gave competent testimony that the subperiosteal hematoma which required surgical removal was in the course of the greater sapphanous vein and that it was the wiser medical procedure to remove the vein (J.A. 22), and that he would not have removed the vein

except for the location of the hematoma in the course of the vein (J.A. 22), and that there was no marked pathological varicose condition requiring removal of the vein (J.A. 22). At no time did Dr. Garnett state that removal of the vein had nothing to do with this case. On the contrary, when asked concerning the nature of the operation for removal of the hematoma, Dr. Garnett stated, "The operation was a simple excision of this area, together with the removal of the entire superficial vein of that leg" (J.A. 20). And, although appellant had been examined by three different doctors for the appellees, no medical evidence was introduced contradicting that of Dr. James Garnett.

If this intentional or unintentional device of the appellees was so effective in causing the experienced trial court to conclude in the face of uncontradicted competent medical testimony that the removal of the vein had nothing to do with this case, it is inconceivable to believe that the jury was not likewise misled, especially when there was added the statement by the court in their presence to that effect.

II.

The Trial Court Committed Harmful Error by Limiting Almost to the Point of Exclusion Interrogation of the Appellant by Her Counsel of the Circumstances Under Which She Was Injured for the Reason that Appellees Had Admitted Liability and Rebuked Counsel in the Presence of the Jury in His Attempt to Present Such Evidence, Reflecting Unfavorably Upon the Appellant, Although the Evidence Was Material and Relevant to the History of Appellant's Injuries and to the Question of Damages.

The first reference by counsel for the appellant to the circumstances under which the appellant was injured was in the opening statement. Counsel for the appellant commenced to make a statement concerning the circumstances resulting in her injuries and was then advised by the Court that he need not go into the facts because the facts were admitted (J.A. 15). Then on direct examination of the appellant there ensued, in part, the following colloquy:

(J.A. 44, 45):

"Q. And, very briefly, in your own words, will you tell us what happened to you that day?

"A. Mr. Arness: I object to that, your Honor. There is no issue.

"The Court: Objection sustained. The liability is conceded.

"Mr. O'Donnell: May I approach the bench, your Honor?

"The Court: No, you may not. One of the reasons for conceding liability is not to go into details and take the time of the Court and the jury describing what happened.

"Mr. O'Donnell: The circumstances under which the injuries were inflicted are related to the severity of the injury and I would like —

"The Court: After I have ruled, if counsel wants to be heard, counsel must ask leave to be heard. The Court does not argue with counsel.

(J.A. 45):

"Mr. O'Donnell: I didn't intend to argue, Your Honor. May I be heard on the matter?

"The Court: You may ask her a leading direct question which would bring out the severity of the impact, that is all, but we do not want to waste time showing how the matter occurred or whether anybody was negligent because liability is admitted. Those things are important when there is a contest.

"Mr. O'Donnell: Thank you, Your Honor.

"By Mr. O'Donnell:

"Q. Did there come a time when you were struck by an object on the 8th of January, 1960?

"A. Yes, sir.

"Q. Where were you at that time?

"A. I was coming out of the apartment house to hang the clothes on the line and —

"The Court: We have all those facts. How hard were you struck?

"The Witness: Well, I was struck hard enough so that it knocked me down against the post.

"The Court: Now you have that.

"By Mr. O'Donnell:

"Q. Miss Stuss, with what were you struck?

(Tr. 45, 46):

"The Court: We have those facts. She was struck by a carton containing some trash. Now, let's move on from there.

"By Mr. O'Donnell:

"Q. Miss Stuss, can you tell us, if you know, where the carton came from.

"A. Yes, sir.

"The Court: Do not ask any more questions along that line. The facts are admitted. All you have to prove is how badly she was injured.

"Mr. O'Donnell: May I be heard a moment on that matter?

"The Court: No, you may not.

"Mr. O'Donnell: Can she be permitted to describe the box?

"The Court: Beg pardon?

"Mr. O'Donnell: Can she be permitted to describe the box or the height from which it fell?

"The Court: Yes, ask direct specific questions, even if they are leading, and move along fast. One of the reasons for admitting liability is not to waste time on the facts of the accident.

"By Mr. O'Donnell:

(Tr. 46):

"Q. Can you tell us from what height the box which struck you came.

"Mr. Arness: If she saw it.

"Mr. O'Donnell: Your Honor permitted me to ask a leading question.

"The Court: Don't argue with counsel, please.

"The Witness: It came from the second story.

"The Court: It is admitted it came from the second story. Please don't ask any more questions along that line.

"Mr. O'Donnell: If Your Honor please, I didn't understand that it was admitted.

"The Court: It is in the pre-trial order.

"Mr. Arness: I agree it came from the second story.

"The Court: Why, of course.

"By Mr. O'Donnell:

"Q. Would you describe the box, if you can?

"The Court: No, we will have no description. It is all in the pretrial order and in your summing up to the jury I will let you read the facts admitted in the pre-trial order. Do not ask any more questions along that line.

* * *

(Tr. 47, 48):

* * *

"By Mr. O'Donnell:

"Q. What is it?

"A. It's a picture of the apartment house and the window where the box was thrown from.

"Mr. Arness: I object, your Honor.

"The Court: It has not been offered in evidence. There is nothing before the Court.

"By Mr. O'Donnell:

"Q. Does the item which you have identified show the premises as they appeared on the date of January 8th, 1960?

"Mr. Arness: I object, Your Honor.

"The Court: Objection sustained. I want counsel to come to the bench.

(At the bench)

"The Court: Mr. O'Donnell, if you are not willing to abide by the rulings of the Court I will order a mistrial right away.

"Mr. O'Donnell: I am more than willing to abide by the rulings of the Court.

"The Court: You wasted about ten minutes trying to bring out the facts of the accident.

One of the purposes of the Court encouraging an admission of liability is to eliminate all that.

"Mr. O'Donnell: I appreciate the purpose of conceding liability, and if I am appearing to be pushing the matter too far, I only wanted the Court and the jury to have an opportunity to see the actual scene.

"The Court: You must not be stubborn. You have got to abide by the rulings of the Court.
You will not be permitted to show to the jury as to how the accident occurred."

Undoubtedly the rationale of the Court in limiting or excluding testimony of the appellant was that the proof should be limited to the issues in the case and that the time of the court should not be wasted, and the jury should not be confused by introduction of evidence which was not material or relevant to the matters to be adjudicated. True, every court has a responsibility to the public to see that justice is administered efficiently and expeditiously and that the facilities of the court are made available at the first possible moment to those waiting trial.

But in the instant case, the evidence concerning the circumstances causing appellant her injuries were material and relevant to the history of her injuries and to damages to which she is entitled, and having long awaited trial herself, appellant ought not to be precluded from introducing material and relevant evidence in the name of efficiency and expedition.

The position is strongly represented in a number of cases from various jurisdictions,[1] including Hayes v. Sutton, et al., District of

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[1] 80 ALR 1224; ALR Supp. Service 1963; Martin v. Migueu (1940) 37 Cal. App. 2d 1933; 98 P.2d 816 (back injury, automobile); Johnson v. McRee (1944) 66 Cal. App. 2d 524, 152 P.2d 526 (automobile); Sumrall v. Butler (1951) 102 Cal. App. 2d 515, 227 P.2d 881 (wrongful death of parents, personal injuries minor daughter) (skid marks, condition of vehicle and circumstances surrounding the accident); Snyder v. General Electric Co. (1955) 47 Wash. 2d 60, 287 P.2d 108 (where plaintiff was sitting on bus, which was hit quite hard from behind, evidence of speed at which it was travelling and other details showing force and direction of impact was admissible); Murray v. Mossman (1958) 52 Wash. 2d 885, 329 P.2d 1089 (photographs of scene of automobile accident for limited purpose of showing force of impact that resulted in the injury and testimony concerning point of impact and course defendant's automobile took after accident); Gulf Oil Corp. v. Slattery (Del.) 172 A.2d 266 (circumstances of sudden rear-end collision as directly relating to nature and extent of plaintiff's whiplash injury to neck); Piper v. Barber Transp. Co. (S.D.) 112 N.W. 2d 329 (tractor struck by truck - proper to admit force with which truck struck, height to which plaintiff's body was catapulted, manner in which it was twisted and character of blow on back when landed on highway).

Columbia Court of Appeals, No. 3150, ___ A.2d ___, decided May 3, 1963, in personal injury cases that, despite admission of liability, evidence of the circumstances surrounding the accident, especially evidence relating to the force of the impact, remains relevant because it bears on the extent of appellant's injuries.

Such evidence is especially relevant in a case such as the one at bar where the complaints of the appellant were to a considerable extent subjective in nature, where medical opinions were necessarily based to a considerable extent upon medical history, (J.A. 63, Tr. 144) and where the appellees sought to minimize the damages on the ground that appellant's complaints were subjective (J.A. 60) and that the doctors had to rely to a great extent upon what she told them (J.A. 60, 65, 66).

III.

The Trial Court Committed Harmful Error by Stating in the Presence of the Jury That the Removal of the Greater Sapphanous Vein From the Left Leg of the Appellant Had Nothing to Do With This Case, and That the Doctor Had So Testified When in Fact the Competent Testimony of the Doctor Who Removed the Vein Which was the Only Testimony on the Point, Was That the Subperiosteal Hematoma Which Required Surgical Removal Was in the Course of the Greater Sapphanous Vein, and That He Would not Have Removed the Vein Except for the Location of the Hematoma in the Course of the Vein.

Dr. James Garnett, the doctor who removed the greater sapphanous vein from the left leg of the appellant, testified that the appellant had some degree of "varicose veins", but that it was not a marked pathological condition – that it wasn't markedly diseased in that manner, but that the trauma in this area which was going to be removed was right where this long vein ran, and that it was better to remove the entire vein (J.A. 22) and that except for the injury he would not have removed it (J.A. 22).

If the vein would not have been removed except for the injury, it follows that its removal was a consequence of the injury. To argue further is to belabor the point. For the Court to state in the presence of the jury contrary to the uncontradicted competent medical testimony that the removal of the vein had nothing to do with this case could only result in removal from consideration by the jury of the amount of damages that should have been awarded appellant for this considerable part of her injuries.

The general rule in tort actions based upon negligence is that the plaintiff's damages may include compensation for all injuries which are the natural probable consequences of the defendant's act or which proximately follow from the wrongful act and include damages not only for such injurious consequences as proceed immediately from the cause which is the basis of the action, but consequential damages as well (15 Am. Jr., Damages, § 68, citing cases).

IV.

The Trial Court Committed Harmful Error in Refusing to Allow Counsel for the Appellant to Interrogate the Doctor Who Had Surgically Removed the Greater Sapphanous Vein of the Left Leg of the Appellant Concerning the Effect of the Removal of the Vein as a Cause of Pain in the Leg and Upon the Circulatory System of the Appellant Whose Occupation Required Her to be on Her Feet a Great Deal of the Time.

Counsel for appellant, on re-direct examination, interrogated Dr. James Garnett, who had surgically removed the greater sapphanous vein from the left leg of the appellant concerning the effect upon the appellant (J.A. 27, 28).

Having concluded that the removal of the vein had nothing to do with this case, the trial court was consistent in excluding evidence concerning the effects of the removal of the vein upon the appellant.

However, the destruction or impairment of any physical function is a proper element of damage and the law assumes that every physical function and capacity is of importance in the life of every man and woman (15 Am. Jr., Damages, § 78).

V.

The Trial Court Committed Harmful Error in Refusing to Admit into Evidence the Hospital Records Although They Were Material and Relevant and Their Admission Without Formal Proof Had Been Stipulated to at Pre-trial.

The appellant offered into evidence hospital records pertaining to her hospitalization and treatment resulting from the injuries which she had sustained on January 8, 1960. There had been a stipulation to their admission without formal proof subject to objections on the grounds of irrelevancy and immateriality at the pre-trial conference. Nevertheless counsel for the appellees objected generally to the admission of the hospital records including the nurses' notes and the court sustained the objection on the grounds that the entries of complaints of the appellant during her stay at the hospital were not routine entries (J.A. 68).

The appellant was hospitalized in 1960 at Sibley Memorial Hospital for the removal of the subperiosteal hematoma and the greater sapphanous vein of the left leg, in consequence of injuries caused by the appellees. The hospital records referred to physical examinations, findings, symptoms, complaints, treatment, progress records, and the results of tests, all a part of the bona fide record of the hospital in the observation, diagnosis, and treatment of the appellant. They were material and relevant to the injuries of the appellant which were the subject of the action below.

If, after there has been entered a stipulation according to which hospital records may be admitted without formal proof, the appellant must nevertheless formally prove the facts reflected by the entries in the hospital records by testimony of each of the many persons in the

hospital who made the entries, not only is the appellant placed in a position of disadvantage by her reliance upon the stipulation but all parties in appellant's position will be unable to rely upon the stipulation at pre-trial and it becomes meaningless.

It is further submitted that entries of complaints in hospital records are routine entries of the observation of persons competent to make them and that the court in excluding the hospital records, continued to exclude from consideration by the jury of a substantial part of appellant's claims.

VI.

The Trial Court Abused Its Discretion in Refusing to Grant a New Trial on the Grounds That the Verdict Was Inadequate.

The competent medical evidence of the appellant by qualified physicians was that the appellant sustained contusion over the right radius (Tr. 22), a subperiosteal hematoma of the left tibia requiring surgical removal (J.A. 31), loss of the greater sapphanous vein of the left leg, removed surgically because the subperiosteal hemotoma was located in the course of the vein (J.A. 27), cervical sprain and nerve root contusions and persistent headaches (J.A. 57, Tr. 155), loss of sensation on the dorsum of the right arm (J.A. 62), and loss of grip on the right arm (J.A. 62).

Doctor Spires testified that the residuals consisted of the continual headaches, pain in the right arm and left leg, and that they must be considered permanent (J.A. 39).

Doctor Murphy testified that it was his opinion that it was reasonable to assume that the appellant would continue to have pain in the head, neck and arms for an indefinite period of time, and that the indefinite persistence was due to the injury (J.A. 60).

The total special damages were shown to be $1,587.78 (J.A. 71).

The verdict and judgment in the amount of $5,000.00 was inadequate to compensate the appellant and there was abuse of discretion on the part of the trial court in denying appellant's motion for a new trial.

CONCLUSION

The net result of the errors assigned was to limit the damages awarded for injuries evidenced by subjective complaints and to remove from consideration of the jury damages for a considerable part of the injuries sustained by the appellant, and the verdict returned for the appellant failed to compensate her for her injuries and was grossly inadequate.

Respectfully submitted,

JAMES F. O'DONNELL

927 - 15th Street, N. W.
Washington 5, D. C.

WILLIAM T. WARD

223 Shoreham Building
Washington 5, D. C.

Attorneys for Appellant

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JOINT APPENDIX

[Filed August 8, 1960]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PEARLE STUSS
4425 14th Street, N.W.
Washington, D. C.

Plaintiff

v.

PRESTON SHELLY and
MARY SHELLY
1465 Monroe Street, N.W.
Washington, D.C.

Defendants

Civil Action No. 2581-60

C O M P L A I N T

(Negligence)

The plaintiff, by her attorneys, sues the defendants for damages resulting from the negligence of the defendants, their agent or employee, and alleges:

1. That the claim for relief herein on behalf of the plaintiff against the defendants is for an amount in excess of Three Thousand Dollars ($3,000.00) and is within the jurisdiction of this Court.

2. That at all times mentioned herein the defendants were the owners of the apartment building at 4425 14th Street, N. W., Washington, D. C., and the plaintiff was a tenant in said apartment building.

3. That on or about January 8, 1960, the plaintiff was seriously, painfully and permanently injured, as hereinafter alleged, as the result of defendants' negligence in that a janitor and building custodian, in the employ of the defendants, on January 8, 1960, acting in the course of his said employment, in cleaning a common passageway of the aforesaid apartment building at 4425 14th Street, N.W., Washington, D. C., did strike the plaintiff with a heavy box of trash by throwing the same from an upper story at a time when the plaintiff was standing on the said

premises in the rear yard hanging clothes on a clothesline provided by defendants and retained under the control of the defendants for the common use of the plaintiff and other tenants; the said box of trash did strike the plaintiff on the head and body with such force as to throw her against the upright clothesline support causing serious injuries as hereinafter set forth.

4. That as a direct result of the negligence as alleged, plaintiff sustained an injury to her left leg resulting in rupture of the greater saphenous vein, contusion with hematoma, pain and swelling; she sustained a large contusion with hematoma over the upper two-thirds of the right radius; she sustained hematomata of the head with injury to the left supraorbital nerve; and she sustained shock to her nervous and mental system; plaintiff was required to undergo hospitalization, surgery for the removal of the injured left greater saphenous vein from the groin to the ankle and excision of the hematoma, and she has been subjected to and is continuing to undergo a prolonged period of recovery attended by medication, enforced rest, and elastic bandage supports, plaintiff is continuing to suffer severe pain in her injured leg and arm and to suffer frequent severe headaches, and maximum recovery will leave her with permanent residuals.

5. That as a direct result of the negligence of the defendants, their agent or employee, the plaintiff has expended or incurred considerable obligations for medical and hospital attention, and she is continuing to incur medical expenses and will in the future incur medical expenses for treatment of the injuries she sustained; plaintiff was unable to go about and is still unable to give full time to her gainful employment and has suffered loss of earnings and will suffer loss of earnings in the future; and plaintiff as the sole proprietor and operator of her business suffered permanent loss of clientele and impairment of the value of her business.

WHEREFORE, plaintiff prays judgment against the defendants, and each of them, in the amount of $35,000.00 and costs.

/s/ James F. O'Donnell
* * *

/s/ William T. Ward
* * *

Attorneys for Plaintiff

Plaintiff Demands Trial by Jury

/s/ William T. Ward

[Filed August 26, 1960]

ANSWER TO COMPLAINT

First Defense

The complaint fails to state a cause of action entitling the plaintiff to relief.

Second Defense

1. Defendants admit that they are the owners of an apartment house at 4425 14th Street, N.W., Washington, D. C. and that plaintiff was a tenant in said apartment building. They further admit that a janitor in their employ did on January 8, 1960 cause a cardboard box to be dropped from the second story of said apartment house into a service yard.

2. Defendants deny each and every other allegation of the complaint.

HOGAN & HARTSON

By /s/ Paul R. Connolly
800 Colorado Building
Washington 5, D. C.
Attorneys for Defendants

[Certificate of Service]

PLAINTIFF'S PRETRIAL STATEMENT

Occurrence:

On or about January 8, 1960, the plaintiff was seriously, painfully, and permanently injured as the result of the negligence of the defendants in that a janitor and building custodian, in the employ of the defendants, on January 8, 1960, acting in the course of his employment, in cleaning a common passageway of the apartment building owned by the defendants at 4425 14th Street, N. W., Washington, D. C., did strike the plaintiff with a heavy box of trash by throwing the same from an upper story at a time when the plaintiff, a tenant of the defendants at the aforesaid apartment building, was standing on the premises in the rear yard hanging clothes on a clothesline provided by the defendants

and retained under the control of the defendants for the common use of the plaintiff and other tenants, and did strike the plaintiff with such force as to throw her against the upright clothesline support.

Injuries:

1. Rupture of the greater saphenous vein of the left leg.

2. Subperiosteal hematoma of left tibia with extravasion of blood and interruption of veins.

3. Contusion with hematoma over the upper two-thirds of the right radius.

4. Hematomata of the head with injury to the left supraorbital nerve.

5. Traumatic occipital neuralgia.

6. Shock to nervous and mental system.

Special Damages:

Dr. Lee Spire	$137.00
Dr. J. H. P. Garnett	100.00
Dr. James Peter Murphy	75.00
Sibley Hospital	434.05
Medicines and prescriptions	50.00
Transportation for medical care	40.00
Loss of earnings	2200.00
Impairment of value of business	
X-rays	26.00

Stipulations:

X-rays
Hospital records
Life Expectancy Tables
Photographs of scene

/s/ William T. Ward

I hereby certify that I have given by hand a copy of the foregoing pretrial statement to an attorney for the defendants this 13th day of April, 1962.

/s/ William T. Ward

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PEARLE STUSS	)	
Plaintiff	)	
vs.	)	Civil Action No. 2581-60
PRESTON SHELLY and MARY SHELLY	)	
Defendants	)	

DEFENDANTS' PRETRIAL STATEMENT

Defendants admit that on January 8, 1960 a janitor in their employ did cause a cardboard box to be dropped from the second story of the premises at 4425 - 14th Street, N. W. into a service yard below. Defendants deny negligence and deny that the plaintiff was injured as seriously as she contends.

REQUESTED STIPULATIONS

1. Copies of Federal Income Tax returns for 1958, 1959, 1960, and 1961.
2. Copies of all medical reports to be exchanged.
3. Physical examination by physician of defendants' choice.

HOGAN & HARTSON

By /s/ David N. Webster
Attorneys for Defendants
800 Colorado Building
Washington 5, D. C.

[Certificate of Service]

[Filed April 13, 1962]

PRETRIAL PROCEEDINGS

Statement of Nature of Case:

Tort for personal injuries.

THE PARTIES AGREE TO THE FOLLOWING STATEMENT OF FACTS:

On January 8, 1960, at about 10 A.M., the Plaintiff, then age 51 and single was a tenant in a building at 4425 14th St., N.W. owned by the Defendants and operated as an apartment building. On said date a janitor in the employ of the Defendants, and acting in the course of his employment, caused a cardboard box to be dropped from the second story of said premises into a service yard below and to the rear of said premises.

PLAINTIFF CLAIMS that the carton was full of folded newspapers and that when the box was dropped it struck the Plaintiff; that at the time she was standing on the premises in the rear yard thereof hanging clothes on a clothesline provided by and retained under the control of the Defendants for the common use of the Plaintiff and other tenants; that as a result of the box striking her she was thrown against the upright clothesline support and that her injuries and damages were caused by the negligence of Defendant's employee as indicated hereinabove.

The Defendants deny any negligence and deny the nature and extent of the injuries claimed; deny that the carton in question was in contact with the Plaintiff.

PLAINTIFF'S INJURIES

Rupture of the greater saphenous vein of the left leg; subperiosteal hematoma of left tibia with extravasion of blood and interruption of veins; contusion with hematoma over the upper two-thirds of the right radius; hematomata of the head with injury to the left supraorbital nerve; traumatic occipital neuralgia; shock to nervous and mental system.

PERMANENT: Traumatic occipital neuralgia; permanent impairment of circulatory system of the left leg; scars on left leg.

SPECIAL DAMAGES

Dr. Lee Spire, $137.00; Dr. J. H. P. Garnett, $100.00; Dr. James

Peter Murphy, $75.00; Sibley Hospital, $434.05; transportation for medical care, $40.00; medicines and prescriptions, $50.00; loss of earnings. $2,200.00; X-rays, $26.00; impairment of value of business ;

STIPULATIONS

Counsel for the P agrees to furnish counsel for D a written statement to be furnished by D, on or before April 30, 1962, which will enable D to obtain copies of the Federal income tax return for the years 1958 to date.

The parties agree to the mutual exchange of all medical reports of examining or treating physicians, now in hand, on or before April 30, 1962, and a similar exchange of all such reports within 48 hours of the alert of this case for trial.

Counsel for P agrees to make the P available for the purpose of a physical examination by physician of D's choice before, but not to interfere with, trial.

The parties agree to the mutual exchange in writing on or before April 30, 1962, of the name(s) and address(es) of witnesses to the accident, to the circumstances surrounding same, and with reference to the nature and extent of injuries and damage, filing a copy thereof on or before said date with the Clerk of the Court.

The following may be admitted in evidence without formal proof, subject to all proper legal objections: x-ray plates; hospital records; HEW Mortality Table; photographs, initialled by Examiner.

Counsel for the P agrees to supply to counsel for the D, and to the Clerk of Court, on or before April 30, 1962, with a written statement setting out and itemizing the "impairment of value of business" as claimed herein.

The Examiner has requested counsel for D to appear at trial with the maximum amount of authority to settle this case which will be allowed him by his principal.

NOTE: Counsel for the P at pretrial had no written medical evidence to sustain the claim of permanent injury but asserted he would supply such before trial to counsel for D.

TRIAL COUNSEL: Francis L. Casey, Jr., Esq. for the D; William T. Ward, Esq. for the Plaintiff.

/s/ William T. Ward Counsel for Plaintiff

/s/ David N. Webster Counsel for Defendant

/s/ John J. Finn
PRETRIAL EXAMINER

[Filed November 6, 1962]

MOTION TO MODIFY AND CLARIFY PRETRIAL STATEMENT AND TO MODIFY AD DAMNUM CLAUSE OF COMPLAINT

Comes now the plaintiff, Miss Pearle Stuss, by and through counsel and respectfully moves this Honorable Court to amend the pretrial order filed herein on April 13, 1962, in respect to "Plaintiff's Injuries" and "Permanent Residuals" so as to read as per the statement attached hereto marked as Exhibit A and made a part hereof and as reasons therefor states

1. That since the pretrial order was filed herein, there has been furnished to counsel for the plaintiff and by them to counsel for the defendant additional and more recent medical information which indicates the necessity of modifying and clarifying the pretrial statement in respect to plaintiff's injuries as detailed in Exhibit A attached hereto.

2. That the aforesaid additional and more recent medical information had not been available to the Court or to the parties at the time of the pretrial conference.

3. That copies of medical reports in support thereof, additional to those on hand at the time of the pretrial conference, are attached hereto and incorporated herein and marked as Exhibits B-1 and B-2.

4. That at the time of the settlement conference before the Honorable Judge Matthews on October 19, 1962, following discussion

of the medical aspects of the case, and on the basis of the report of Dr. Murphy, Exhibit B-1, and upon the suggestion of the Honorable Judge Matthews and counsel for the defendant that a more explicit report concerning plaintiff's injuries, course of treatment, and residuals be obtained, counsel for the plaintiff indicated their intention of obtaining said further report and of their intention of filing this motion as soon as a further medical report could be obtained from H. Lee Spire, M. D., and could be furnished to counsel for the defendant, which report is attached hereto as Exhibit B-2.

Plaintiff further respectfully moves this Honorable Court, in light of the recent and additional medical information which indicates that the injuries of the plaintiff were greater and more serious than was known at the time the suit was filed, to increase the ad damnum clause from $35,000.00 to $60,000.00.

James F. O'Donnell and William T. Ward
Attorneys for the Plaintiff
/s/ William T. Ward

[JURAT dated November 1, 1962]

[Filed November 6, 1962]

EXHIBIT A

Personal Injuries:

1. Injury to the greater saphenous vein of the left leg, hematoma of the left tibia with extravasation of blood and interruption of veins, requiring removal by surgery of the hematoma and of the greater saphenous vein of the left leg.

2. Contusion with hematoma over upper two-thirds of right radius, pain and numbness of the right arm, sensory loss on dorsum of right forearm and slight weakness of hand grip on the right.

3. Hematoma of the head with injury to the left supraorbital nerve, traumatic occipital neuralgia, persistent severe headaches, and shock to nervous and mental system.

Permanent:

1. Continued swelling and pain in the left leg below the knee, permanent loss of the greater saphenous vein of the left leg, scar of the left leg, permanent impairment of circulatory system of the left leg, and permanent limitation in the use of the left leg.

2. Pain and numbness of right arm and sensory loss on dorsum of right forearm and slight weakness of hand grip on the right, and limitation in the use of the right arm.

3. Traumatic occipital neuralgia and persistent severe headaches.

[Filed November 6, 1962]

EXHIBIT B-1

JAMES PETER MURPHY, M.D.
ROBERT A. MENDELSOHN, M. D.

* * * * * *

September 24, 1962

Mr. James F. O'Donnell
Attorney at Law
917 15th Street, N.W.
Washington, D. C.

Re: Miss Pearl Stuss
D/A: January 8, 1960

Dear Mr. O'Donnell:

On September 20, 1962, at the request of Doctor R. Lee Spire, I reexamined Miss Pearl Stuss. She complains of persistent headaches in the left occipital region and of pain and numbness of the right arm especially after she has been working as a beautician for most of the day. Her legs hurt where the veins were operated upon as well.

The blood pressure is 180/90. There is sensory loss on the dorsum of the right forearm, slight weakness of handgrip on the right. The left occipital nerve was tender to pressure. The patient appeared

to be somewhat short of breath but not excessively. Otherwise, complete examination of the cranial nerves, reflexes, sensation, coordination and motor power was within normal limits.

The patient herself stoutly avers that she had none of these complaints prior to the injury referred to as having occurred on January 8, 1960. Needless to say, someone with her body build including the twisting of the neck secondary to the kyphoscoliosis is liable to retain symptoms from injuries to the head or neck longer than if she were not so constituted. It is my considered opinion that the complaints referred to are the result of the injury described.

The date of complete relief of these complaints is uncertain and cannot be stated definitely at this time.

Very sincerely yours,
/s/ J. P. Murphy, M. D.

cc: Dr. R. Lee Spire
JPM:c

[Filed November 6, 1962]

EXHIBIT B-2

R. LEE SPIRE, M. D.
4600 CONNECTICUT AVE. N. W
WASHINGTON 8, D. C.
EMERSON 2-7227

October 29, 1962.

Mr. James F. O'Donnell
917 15th Street, N. W.
Washington, D. C.

Dear Mr. O'Donnell,

This is to supplement my statement of May 25, 1960 and to report conditions as they now exist and other relevant information.

Miss Stuss still suffers persistent severe headaches in the left occipital area which require daily large doses of analgesics and occasionally narcotic drugs to alleviate the pain. The right forearm becomes exceedingly painful after short periods of work as a beautician.

The left leg below the knee becomes very painful and swollen after a few hours of work. This condition is caused by the necessary removal of the left saphenous vein which was severely damaged at the time of Miss Stuss's accident. These handicaps have curtailed materially her hours of productive work.

The physical evidence of trauma which was revealed at my examinations, immediately subsequent to the accident; the surgical findings of Dr. James Garnett when it became necessary to remove the vein in her left leg; the neurological findings of Dr. Peter Murphy; the chronology in the sequence of pain and disability following the trauma, and the correlation of areas of pain with the sites of injury, make it impossible that there can exist a doubt that the pains and disabilities from which Miss Stuss now suffers, are directly attributable to injuries received in her accident.

I have been Miss Stuss's physician for nine years and she has been a close personal friend of my wife for sixteen years. Because I have known Miss Stuss both professionally and socially I feel that I am particularly well qualified to attest that none of the painful and disabling conditions from which she now suffers, existed before her injury in 1960.

Where such pathological conditions as Miss Stuss now has, have existed for nearly three years without noticeable improvement, it is my considered opinion, that they must be considered as permanent.

Respectfully,

/s/ R. Lee Spire, M. D.

[Filed November 9, 1962]

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION TO MODIFY AND CLARIFY PRETRIAL STATEMENT AND TO MODIFY AD DAMNUM CLAUSE IN COMPLAINT

The pre-trial proceeding previously held in this cause presumably fixed the allegations upon which the trial was to be conducted. Previously,

at plaintiff's request, a ready certificate was filed which precluded further discovery. Up until this time the case has always been one in which the plaintiff's claims were impairment of the circulatory system of her left leg and headaches and the only medical reports which had been submitted related to those issues. Now plaintiff comes forward and seeks to increase the amount of the claim from $35,000 to $60,000 and to modify the claimed injuries and residuals. The motion does not specifically set forth the language of the amendments requested. However, the medical reports which have been recently submitted do not show any justification and the special damages, which amount to $862 as medical expenses, do not justify an ad damnum in excess of $35,000.

The file reflects that this female plaintiff sustained an accident when she was 3 years old which led to a deformity in her back and shoulder. Apparently the present effort is directed towards making some claim with reference to pain and numbness in that area and it should not be permitted without the clearest type of medical showing which apparently is not available.

Respectfully submitted.

HOGAN & HARTSON

By /s/ John P. Arness
Attorneys for Defendants
800 Colorado Building
Washington, D. C.

[Certificate of Service]

[Filed November 26, 1962]

ORDER

Upon consideration of the motion of the plaintiff to modify and clarify pretrial order herein and to modify the ad damnum clause of the complaint, and of the opposition to said motion filed herein by the defendant, it is by the Court this 26th day of November 1962,

ORDERED, That the aforesaid motion of the Plaintiff be and the same hereby is granted and the pretrial order filed herein on April 13, 1962, is hereby amended in respect to "personal injuries" to include

Injury to the greater saphenous vein of the left leg, hematoma of the left tibia with extravasation of blood and interruption of veins, requiring removal by surgery of the hematoma and of the greater saphenous vein of the left leg;

Contusion with hematoma over upper two-thirds of right radius, pain and numbness of the right arm, sensory loss on dorsum of right forearm and slight weakness of hand grip on the right;

Hematoma of the head with injury to the left supraorbital nerve, traumatic occipital neuralgia, persistent severe headaches, and shock to nervous and mental system;

and in respect to "permanent residuals" to include

Continued swelling and pain in the left leg below the knee, permanent loss of the greater saphenous vein of the left leg, scar of the left leg, permanent impairment of circulatory system of the left leg, and permanent limitation in the use of the left leg;

Pain and numbness of right arm and sensory loss on dorsum of right forearm and slight weakness of hand grip on the right, and limitation in the use of the right arm;

Traumatic occipital neuralgia and persistent severe headaches, and

It is further ORDERED, that the ad damnum clause of the complaint be and the same hereby is increased from $35,000.00 to $60,000.00; and

It is further ORDERED that in view of these modifications plaintiff will provide defendants with copies of all medical reports, including up to date medical reports from each of her treating or examining physicians on or before December 7, 1962 and those which may be received thereafter; that plaintiff will submit to additional oral examination, by way of deposition, on the new issues; that plaintiff will submit

to neurological examination by a physician of defendants' choice on or before December 14, 1962; and that defendants be and the same hereby are authorized to take the oral deposition of plaintiff's examining physician, R. Lee Spire, M. D.; and

It is further ORDERED, that defendants may have an additional thirty days within which to complete their discovery on the issues raised by plaintiff's modifications.

/s/ G. L. Hart, Jr.
United States District Judge

[Certificate of Service]
by /s/ John P. Arness

* * *

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

1

Washington, D. C.
March 18, 1963

The above cause came on for trial before the HONORABLE ALEXANDER HOLTZOFF, United States District Judge, and a jury, commencing at 1:45 p.m.

* * * * *

3

PROCEEDINGS

(Following voir dire examination, a jury of twelve and two alternates was empaneled and sworn.)

THE DEPUTY CLERK: All witnesses in the case of Stuss vs. Shelly please follow the Marshal to the witness room.

* * * * *

4

(AT THE BENCH:)

THE COURT: I want to inquire formally of you, as I did informally, does the defense admit liability?

MR. ARNESS: Yes, Your Honor.

THE COURT: Then this trial will be limited to the question of damages. You probably don't need Mr. Green.

MR. O'DONNELL: We didn't know whether counsel was prepared to do that.

THE COURT: Of course not. That will shorten the trial, anyway.

MR. WARD: If I were to call a doctor and he comes here, may he be inquired out of turn?

* * * * *

(IN OPEN COURT:)

THE COURT: Ladies and gentlemen of the jury,

* * * * *

5 Now, in this case counsel for the defendants has informed the Court that the defendants admit liability, that is, they admit that they are liable, and the only issue that you will have to try and determine is the amount of damages that should be awarded to the plaintiff against the defendants. I have explained to you, when you were interrogated, as to what this case is about and how it arose. The defendant admits the facts, admits that it is liable to pay damages for such injuries as the plaintiff has suffered, and the question for you to determine, and the only question, will be what amount should be awarded to the plaintiff.

* * * * *

OPENING STATEMENT IN BEHALF OF PLAINTIFF

MR O'DONNELL:

* * * * *

6 The incident in question occurred on the 8th of January 1960 in the vicinity of 4425 - 14th Street, Northwest, where the plaintiff resides in the apartment building owned and operated by the --

THE COURT: I don't think you need to go into the facts because the facts are admitted. The only matter that we are going to litigate is the extent of the damages.

MR. O'DONNELL: I will be as brief as I can, Your Honor.

So, while the plaintiff was standing in the rear area of the building in question, she was struck on the head --

THE COURT: Mr. O'Donnell, you need not state the facts of the case, I mean how the injury arose, because the liability is admitted. We are not going to try the facts as to how the injury occurred. The defense says it occurred, it is their employee's fault and they are liable. So, the only thing I would confine my opening to, if I were you, would be the damages that you claim were sustained by your client.

MR. O'DONNELL: Thank you, Your Honor.

As a result of the incident in question, when the plaintiff was

7 struck upon the head and thrown against a clothes stanchion, the plaintiff contends that she received injuries to the head at the site of the impact which has resulted in a traumatic neuralgia; that she also was thrown against the clothes stanchion as a direct result and because of which she received injury to the right forearm, which the plaintiff contends is a permanent and disabling injury; and that as a result of the blow in question and being knocked against the stanchion in question the plaintiff received injury to her leg, specifically resulting in a hematoma on the left leg, below the knee, for which she was treated by her family physician and as a result of which it became necessary to hospitalize her to remove the hematoma, subperiosteal hematoma, and that in the removal of this hematoma by the surgeon, who will testify in this case, it became necessary and advisable to remove the greater saphenous vein of the leg from the ankle to the groin. For this the plaintiff was hospitalized.

* * * * *

8 The plaintiff further contends that there is an actual loss of earnings for the period of hospitalization and for the period of total incapacitation following the removal of the greater saphenous vein in the leg.

* * * * *

9 OPENING STATEMENT IN BEHALF OF DEFENDANTS

MR. ARNESS:

* * * * *

The evidence will show you that in this operation Dr. Garnett went farther and he took out what is generally known as a vericose vein.

Now, there will be a lot of evidence introduced as to whether or not that vein that he took out was actually a vericose vein. There will be a lot of evidence introduced to enable you to decide whether or not Miss Stuss got any vericose veins as a result of being struck by a cardboard box on her head.

The evidence will show you that Miss Stuss, for a long period of time, had been engaged in work which required that she stand on her feet daily and, when she worked, almost all day long; and then you will be asked to decide whether or not this vericose vein problem was caused by the accident that is the subject matter of this lawsuit.

* * * * *

The evidence will show you that she complains of headaches, but that there was never any what they call organic injury to the head which would reasonably account for headaches over a prolonged period of time.

The evidence will show you that she complains of pain and discomfort in her right arm and a loss of strength in her right arm, but that nothing was injured in her right arm which would account for pain of that kind. Indeed, the injury that she did sustain in the right arm was one which was to a sensory nerve, that is, that the nerve was bruised, a sensory nerve, so that over a period of time after she was bruised there she could not feel the normal sensations in this arm. The evidence will show you that this nerve was not one that had any strength functions to perform, it was not one that had any pain features to it. It was a nerve, in short, that enables you to feel when someone touches you at a certain place in your body.

Now, the evidence will, of course, follow the pattern of the case in pre-trial proceedings that have been had before the Court. That evidence will show you that there is approximately seven or eight hundred dollars of expenses claimed by Miss Stuss of a medical nature. We ask you to look at those claims and decide which ones you think

are truly related to this accident, accept those, disregard any others.

* * * * *

(AT THE BENCH:)

THE COURT: Gentlemen, in view of the fact that liability is admitted this should not be a long trial. Just put on your evidence of damages. We ought to get through sometime tomorrow, I should think. Anyway, do your best. We are going to recess this afternoon until 11:30 tomorrow because I have to get another case to the jury first thing in the morning and it will take that long. I shall recess this case until 11:30.

MR. O'DONNELL: If Your Honor please, I don't plan to be extensive in asking about the incident, but I do want to just show the background from the witness.

THE COURT: We don't want any background; just let's get down to the issues.

MR. O'DONNELL: Distance and severity of impact is a factor.

THE COURT: Yes, you may show that, but that should not take more than a moment or two.

* * * * *

Thereupon,

JAMES H. P. GARNETT

called as a witness by the Plaintiff and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WARD:

Q. Doctor, will you please state your full name? A. James Harper Poor Garnett.

* * * * *

Q. Are you a licensed practitioner of medicine in the District of Columbia? A. Yes, I am.

* * * * *

Q. Doctor, do you have a specialty? A. Yes, I do.

Q. And what is that specialty? A. General surgery.

THE COURT: Will the doctor's qualifications as a general surgeon be admitted, Mr. Arness?

MR. ARNESS: Yes, Your Honor.

THE COURT: Very well. Thank you.

BY MR. WARD:

Q. Now, Doctor, in the course of your practice did you have occasion to treat in any manner Miss Pearle Stuss? A. Yes, I did.

Q. When did you first see her? A. March 22nd, 1960.

Q. And how did it happen that you saw Miss Stuss, at whose request? A. Dr. Spire referred Miss Stuss to our office and I saw her at his request.

Q. And for what did you see her at that time? A. Miss Stuss
18 had pain in her left leg, which was stated to be due to a previous fall, and there was a lump in this area.

Q. For the purpose of treatment of Miss Stuss did you take a history from her? A. Yes, I did.

Q. And what did that history disclose? A. Shall I read it?

THE COURT: No, you may consult your notes, if you wish, but testify from memory after having refreshed your recollection, if you have to do so.

THE WITNESS: At the time of seeing Miss Stuss, which was on the 22nd of March, 1960, she stated that ten weeks prior to that time she had been hit and had fallen, striking her left leg, which caused a bump in this area, and that since that time, even under medical treatment, the bump had failed to completely go away and she continued to have pain.

BY MR. WARD:

Q. And what did your examination disclose? A. There was a four centimeter, which is about two and a half inches --

THE COURT: There was a what?

THE WITNESS: I said four centimeters, then I said two and

a half inches long. I am describing the length --

19 BY MR. WARD:

Q. Four centimeters? A. Yes.

THE COURT: Four centimeter what?

THE WITNESS: I haven't finished.

BY MR. WARD:

Q. Proceed. A. -- area in the front part of the left leg, which was discolored and brownish and tender to touch.

Q. Did you determine the nature of this area, what caused it and what it was? A. It appeared most likely to me that this was a hematoma or, in other words, the same sort of thing as a black eye, caused by extravasation of blood under the skin, which I presumed to be due to the fall she had described.

Q. What course of treatment did you prescribe, if any? A. Since ten weeks had elapsed and the area was still present and still causing discomfort, I, in agreement with Dr. Spire, suggested that the area be surgically removed or excised.

Q. What arrangements were made to accomplish this? A. Miss stuss was admitted to Sibley Hospital on the 21st of that same month for operation, which was performed the following day, on the 22nd.

20 Q. What was the nature of that operation? A. The operation was a simple excision of this area, together with removal of the entire superficial vein of that leg.

Q. Can you describe for the Court and for the jury, in some small degree, how this operation was accomplished? What did it require? A. After the patient is put to sleep the entire left extremity --

THE COURT: Is it a general anesthetic?

THE WITNESS: Yes, sir. The patient is asleep under general anesthesia, and the leg is very carefully and thoroughly scrubbed with surgical soap and water and painted with what is called tincture of zephran, an antiseptic solution, and then sterile drapes and towels and sheets are placed around, everybody being gloved and masked and observing sterile precautions. Following this, the area described is excised.

By that I mean a knife is taken and the area is cut out, and then the bleeding is controlled and the skin is sutured back together.

Now, in this particular case, this area on the front part of the left leg was in the course of the main superficial vein, which runs from the groin clean down to the ankle, just under the skin.

21 Now, this is a separate system of veins from the deep veins, which are in the calf of the muscle. And, since this area of bruising had occurred over this long vein, it was decided that the wisest thing to do would be do what is called a ligation and stripping operation, which is a standard operation for the treatment of vericose veins. Accordingly, this was performed. This involves a very small incision through the skin only, up in the groin, and by very small I mean about two inches long, and this large vein is picked up here. Another even smaller incision is made in the ankle, just on the inside of the ankle, and the same vein, where it has run down the leg, is then picked up in this area. A piece of surgical equipment which is called a stripper is used. It is a long flexible sort of wire and it is inserted into the vein and threaded through it, just like a roto-rooter, goes right on down, starts in one, comes out the other, and the vein is tied and the vein is then pulled out. That removes all the branches. As I say, this vein in both cases is just barely under the skin. So, following this, the skin is sewed up and a bandage is put on.

BY MR. WARD:

Q. Now, Doctor, is this procedure and the course of recovery thereafter, normally accompanied by any pain or discomfort? A. Yes.

22 Q. Could you describe the extent or severity of it and the duration of it? A. You mean in the usual case?

THE COURT: No, in this case.

BY MR. WARD:

Q. In this case, if you know. A. Well, in this case the wounds healed per primam; in other words, without infection and cleanly, and the patient was up and walking the second day. She was discharged from the hospital April 5th, having been operated on the 22nd of the

preceeding month. She was up and around. Then I saw her quite a few times in the office. And she continues to complain of pain.

* * * * *

25 Q. Doctor, will you state, please, what made it necessary, in your opinion, to remove this vein which you had spoken of as having been removed? A. Miss Stuss had some degree of what we call vericose veins. In other words, dilatation of the superficial veins under the skin in the leg. In my opinion, it was not a marked pathological condition. In other words, it wasn't markedly diseased in that manner. However, this trauma in this area which was going to be removed was right in the course where this long vein ran, and it was my opinion that it would be better to remove the entire vein with this procedure I have described, the ligation and stripping procedure, because were that not done and she might later require operation for this, then it could not be stripped in this manner, it would require further and perhaps more difficult work.

26 Furthermore, the patient being under a general anesthesia, it was my feeling that this added very little to the operative time or trauma to her and that it would be the proper thing to do; and Dr. Spire agreed.

Q. Now, Doctor, if assuming that there had been no trauma on January 8, 1960 --

THE COURT: I would not use the word trauma because some of the jurors may not be familiar with it. I was not familiar with it, either, until I heard a lot of medical testimony. That is a scientific term.

BY MR. WARD:

Q. Doctor, if assuming that there had not been an injury to the leg of Miss Stuss on January 8, 1961 -- 1960, would you have an opinion as to whether or not it was then necessary to remove that vein? A. I would say no, that I would not have thought it necessary to remove the vein.

* * * * *

27 CROSS-EXAMINATION

BY MR. ARNESS:

* * * * *

29 Q. The question I want to put, Doctor, is this: The form, on the front part, has to do with the head, the eyes, the ears, the nose, the mouth, et cetera; and on the back part, to the extremities and to the neurological and, particularly, the spinal regions and the back and the legs.

Now, is it true that, except for the deformity that Miss Stuss had and has had from birth, that that examination was all negative, that she was all right except for that particular thing and for the bruise that you examined her and treated her for?

* * * * *

30 Q. My question, Doctor, is it true that this examination was completely negative except for the hematoma on the left leg and the congenital defect on the shoulder and back? A. So it says, yes.

Q. Thank you, Doctor. Now, in connection with the hospitalization and with your treatment of Miss Stuss in the hospital you took a history from her, did you not? A. In the office.

Q. And you, in that history, asked her for her present complaints, did you not? A. Yes.

Q. And she had no complaints to you except with reference to the leg and the bruise and the pain on that left leg, did she? A. That's correct.

Q. And this was in March; specifically, I believe you indicated March 22nd, 1960? A. That is right, yes.

31 Q. Now, the accident that is involved in this case, Doctor, took place January 8th, 1960. It's fair to state insofar as your examination and treatment of her as a physician is concerned, that any difficulty that she had from that accident, except for the left leg, was cleared up as of March 22nd, 1960, is that correct? A. No, I don't think so.

* * * * *

Q. Well, did she tell you anything else except the left leg was bothering her, Doctor? A. No.

Q. Well, did you observe in your examination anything else that was bothering her? A. No.

Q. Well, then, as far as you were told or as far as you observed, the only thing that was bothering her was her left leg? A. That is correct.

* * * * *

32 Q. Now, Doctor, can you tell us what a vericose vein is? A. A vericose vein is a dilated vein. It is usually referred to as those veins on the lower extremity, both the thigh and the lower leg, and that particular set of veins which is superficial or, in other words, just under the skin and not deep and down in the muscle, where there are another set of veins. These veins become dilated. They lose their valves. They have valves in them which prevent this column of blood, which man has achieved by being in the upright position instead of staying on all fours, this column of blood needs these valves from becoming too much hydrostatic pressure and these valves act to prevent this heavy weight of blood in the upright position.

As these valves dilate -- excuse me -- as these veins dilate, the valves become incompetent. In other words, the valves pull apart and the whole column of blood is pressing down. That leads to slowness in circulation and certain changes in the skin and eventually things like what they call vericose ulcers.

Is that more or less what you want?

Q. Yes, Doctor. Thank you. Now, these changes and the slowness in circulation that you have indicated, they in the normal case come about over a long period of time, don't they? A. That is correct.

33 Q. Now, as I understood your testimony, Miss Stuss had slightly vericose veins but not a condition which would have required an operation, is that correct? A. That is correct.

Q. But her veins did have the beginning signs of the tortuous

nature of a vericose vein? A. That's right.

Q. Now, so that while you were operating for this hematoma and you saw this condition, both as you said because it would not substantially add to the operative procedure and because you thought she might have less difficulty in the future, you took those out at that time? A. That is correct. In other words, if the injury had been in another area, I probably wouldn't have done it.

Q. So you don't contend that this accident of January 8, 1960 caused her to have vericose veins which required an operation, do you? A. No.

THE COURT: May I interrupt with a question?

MR. ARNESS: Certainly, Your Honor.

THE COURT: Which was the more serious or important feature of the operation, removal of the hematoma or the operation on the vericose vein?

THE WITNESS: Well, they were both rather minor, actually,
34 sir. I don't think it would be too much to choose.

THE COURT: I see.

BY MR. ARNESS:

Q. And this type of surgery, although no one likes to think about surgery, I guess, Doctor, but this is a minor type of operation, isn't it? A. That's correct.

THE COURT: It required general anesthetic, though, didn't it?

THE WITNESS: Yes, sir.

BY MR. ARNESS:

Q. Now, Doctor, did anything occur during the course of the operation or during the post- operative treatment afterwards which, in your opinion, would have been productive of complaints and of pain and disability over a long period of time that was directly related to your surgery? A. No, sir.

Q. As far as you know, your surgery was a success? A. I would assume so. She still has pain, she says. I don't know.

Q. But you didn't see anything that would be productive of that complaint, did you? A. No, I didn't.

Q. Have you examined Miss Stuss recently? A. Yes, I have.

35 Q. And have you to this date seen anything that would be productive of such pain incident to the leg and to your surgery? A. No, I have not.

Q. Now, this thing, the stripping of the veins, is that some operative procedure that you have performed on numerous occasions? A. Yes, I have.

Q. And that involves just taking the superficial vein closest to the surface of the leg --

MR. WARD: Objection, Your Honor; not relevant. I object to any testimony concerning testimony of operations on other persons as not being relevant.

THE COURT: Read the last question.

(The last question was read by the reporter.)

THE COURT: Read the preceding question.

(The next to the last question was read by the reporter.)

THE COURT: Objection overruled.

BY MR. ARNESS:

Q. Then, Doctor, the question: That operation, does that merely involve taking the superficial vein and removing it so it is no longer there? A. In general, that is correct. Of course, there

36 are so many variants in different people with different degrees --

* * * * *

Q. In this case is that the vein that you took out? A. Yes, it is.

Q. And are there other veins which are remaining which are competent to take the blood flow back and forth in the normal manner? A. Yes, there are.

MR. ARNESS: Thank you. No further questions.

* * * * *

REDIRECT EXAMINATION

BY MR. WARD:

Q. Doctor, assuming that the plaintiff, Pearle Stuss, was engaged in an occupation which required her to remain standing a good deal, would this have any -- would this be a competent producing cause of any discomfort which she might experience?

THE COURT: Of course, this is not proper redirect.

MR. WARD: I will withdraw the question, then.

THE COURT: You may reopen your direct examination, if you think it is important enough.

37 MR. WARD: All right, with the permission of the Court.

THE COURT: Then we will have to call the Doctor back tomorrow.

MR. WARD: That is the only question I would ask.

THE COURT: Very well. Read the question.

(The last question was read by the reporter.)

THE COURT: When you say "this" what do you mean by "this"?

MR. WARD: Would her having to stand a great deal be a competent --

THE COURT: You said would this be a competent producing cause. What is "this"? You see, there were two different operations here, the hematoma and the vein. Now, what is your question directed to?

BY MR. WARD:

Q. My question, Doctor, is this: Assuming that Miss Stuss is engaged in an occupation which requires her to remain standing a great deal, would the removal of the hematoma and the incidental removal of the vein be a competent producing cause of any discomfort she may now or subsequently feel?

THE COURT: Well, now, the removal of the vein has nothing to do with this case; the hematoma does.

MR. WARD: Your Honor, I would submit that the Doctor has

38 testified --

THE COURT: The Doctor has testified that the removal of the vein had nothing to do with this case, that he removed it because it was convenient to do it at this time.

MR. WARD: May it please the Court, it is my understanding that the Doctor removed the vein in this case because the hematoma was in the course of the vein and that this was the wiser medical procedure to follow.

THE COURT: Well, now, I am not going to argue with you; I only rule.

MR. WARD: All right, I will withdraw my question.

THE COURT: You have a right to reframe your question and ask him whether the hematoma and its removal was a cause of any distress. That is different.

BY MR. WARD:

Q. Well, Doctor, would you have an opinion, then, as to whether or not the removal of the hematoma and the removal of the vein for a person so occupied would be a competent producing cause of discomfort thereafter?

MR. ARNESS: I object, Your Honor.

THE COURT: Objection sustained because you are bringing in the removal of the vein. If you want to limit your question to the hematoma, that would be proper.

MR. WARD: I will withdraw the question.

* * * * *

40 Washington, D.C.
March 19, 1963.

* * * * *

41 RICHARD L. SPIRE

called as a witness by the Plaintiff and, having been first duly sworn, was examined and testified as follows:

42 DIRECT EXAMINATION

BY MR. O'DONNOLL:

* * * * *

Q. Would you identify yourself to the Court? A. I am Dr. Richard L. Spire.

Q. And are you a practicing physician in the District of Columbia, a medical practitioner? A. I am.

Q. Where do you have your offices, Doctor? A. At 4600 Connecticut Avenue.

Q. And you are a licensed medical practitioner? A. That is correct.

Q. For how many years have you practiced medicine, Doctor? A. Fifty-six.

Q. Are you affiliated with Sibley Hospital, Doctor, in any capacity? A. I am. I am now the Emeritus Chief of the Department of Medicine. I was the Active Chief from 1929 to 1958. Also, Chief of Staff from 1949 to 1958.

* * * * *

43 Q. Doctor, do you know the plaintiff in this case, Pearle Stuss? A. I do.

Q. And can you tell us in what capacity you came to know her? A. As her family physician.

Q. Dating back to what date? A. To 1957.

Q. Did there come a time on or after January 8, 1960, when Miss Stuss consulted you for medical attention? A. Yes. May I refer to my notes?

THE COURT: Yes, indeed.

THE WITNESS: She came to me on the 8th of January 1960.

BY MR. O'DONNELL:

Q. And at that time, Doctor, what were Miss Stuss' complaints? A. She gave a history of having been struck on the head when a box of trash was thrown out of the third story window by a janitor.

Q. What physical complaints or difficulties did she have on that day? A. There was a contusion over the right radius in the upper
44 and middle third.

THE COURT: Contusion over what?

THE WITNESS: Over the right radius area. That is one of the bones in the forearm, on the thumb side of the forearm.

And a contusion in the middle third of the right shin bone area.

BY MR. O'DONNELL:

Q. What, if any, treatment did you prescribe at that time? A. She was just given sedation and, for the first day or two, just hot packs on the arm and on the leg, and medicine to relieve her pain.

Q. What, if any, instructions did you give the patient as to continuing her course of employment at that time? A. I felt that if she were able she could do it to a limited extent. I advised her to go on part-time work.

Q. During the month of January 1960, did you have occasion to see Miss Stuss professionally at other times? A. Yes.

Q. When were they? A. The next time after the first visit was on the 15th of January, when she displayed a large hematoma -- that
45 is a big clot of blood -- at the area of the contusion on the leg and on the forearm.

Q. And that was on January 15th? A. That is correct.

Q. Did you see her again in January? A. I saw her again on the 25th.

Q. Was that in connection with the same complaints? A. These visits were all for those injuries.

Q. And how many times, if your records disclose, did you see her during the month of February 1960? A. I saw her on the 4th of

February and not again until March.

Q. Doctor, you testified earlier, I think -- A. Excuse me, please. That is in error. I saw her on the 22nd and on the 24th of February.

THE COURT: How many times altogether in February, Doctor?

THE WITNESS: Three.

BY MR. O'DONNELL:

Q. Doctor, I am not sure in my own mind as to which leg it was that was injured. A. The left leg and the right arm.

Q. And during the month of March 1960, did there come a time
46 when you referred the patient to any other physician for consultation or medical treatment? A. Yes, there was. For these hematomas on the arm and leg I attempted to dissolve them by the use of enzymes. When there was no satisfactory response to this treatment I advised her to consult a surgeon and I referred her to Dr. James Garnett.

Q. Dr. Spire, directing our attention to this hematoma on the left leg, could you tell us in layman's words what this involved? A. It involves a hemorrhage under the skin, in this case under the covering of the bone. The hematoma was under the covering of the tibia, the large shin bone. There were also extensive soft tissue bruises and injuries. The tissues around the calf of the leg and down both sides of the leg.

Q. And for what purpose did you refer her to Dr. Garnett and Dr. Putsky? A. This hematoma had not resolved, had not changed, was causing her excessive pain, and I referred her to a surgeon for the removal of this hematoma.

Q. And to your knowledge was such surgery performed? A. Such surgery was performed.

Q. Was the surgery performed at Sibley Hospital? A. That is correct.

47 Q. Did you have occasion to visit the patient at any time while she was at Sibley Hospital? A. Yes, I saw her on March 22nd, 23rd, 25th, 26th, 27th, and the 29th, and on April 1st.

Q. This is all in the year 1960, is that correct, Doctor? A. That is all in the year of 1960.

Q. Did there come a time in the course of your examination or treatment when you requested x-rays be taken of Miss Stuss? A. Yes, the x-rays were taken -- the x-ray report was given to me on the 25th of January.

Q. And what, if anything, did that report indicate, Doctor?

MR. ARNESS: I object, Your Honor. The report speaks for itself.

THE COURT: You object to what?

MR. ARNESS: Your Honor, the question is what, if anything --

THE COURT: I know what the question is. What is the ground of your objection?

MR. ARNESS: I object to the Doctor reading the report of some other doctor. It speaks for itself.

THE COURT: No, he is not asked to read the report of other
48 doctors. He is asked what did the x-ray films indicate.

Did you examine the x-ray films, Doctor?

THE WITNESS: Yes, sir, I did.

THE COURT: Then he is competent to answer. Object, overruled.

THE WITNESS: Shall I proceed?

THE COURT: Yes.

BY MR. O'DONNELL:

Q. Please. A. The x-ray was taken of the right arm and of the left leg and displayed no bone or joint injury. X-rays do not show injuries to soft tissues. They are very easily seen and felt.

Q. Doctor, there came a time when the plaintiff, Miss Stuss, was released from Sibley Hospital in early of April of 1960, is that correct? A. That is correct.

Q. And did you see her subsequent to that time for the injuries which you have already described to us? A. She was left under the

care of Dr. Garnett. I didn't see her from the time she left the hospital until the 30th of June. Then I left town for three months and I didn't see her again until the 19th of September.

49 Q. Doctor, would your notes indicate, or can you recall what her condition was when you saw her on June 30th of 1960? A. I received at that time a laboratory report from Sibley Hospital stating that the left saphenous vein had been removed. Wait a minute. That is not correct. You asked me on the 30th?

Q. On the 30th of June, 1960, if you can recall or if your records refresh your recollection. A. She was suffering on the 30th of June from edema. That is swelling of the left leg.

Q. Was this swelling -- did your examination or your consultation indicate whether this swelling was a continuing process or was it something that had come on suddenly? A. I can't answer that question, sir.

Q. Following this examination did you prescribe any treatment or medical remedy? A. Yes, she was given further medicine which helps to dissolve blood clots. She was given medicine for the pain and continuing hot and cold applications. For that we use ice cold towels followed by hot towels in rotation. It stimulates circulation.

Q. At this time was she required to wear any support at all?

50 A. Yes, I advised her to use elastic stockings.

Q. I think it's your testimony, then, Doctor, that you left the area until September of 1960? A. That is correct.

Q. On your return did you see the plaintiff, Pearle Stuss, for treatment in connection with these injuries in September of 1960? A. On the 19th of September my notes show that she was suffering a residual pain in the left lower leg and in the right forearm, where these hematomas had existed, where the injuries had taken place.

Q. And was it necessary for you to prescribe any treatment or remedy at that time? A. Nothing further than medicine to relieve her pain.

Q. You mentioned her pain. At that time did she indicate to you that pain was present? A. Yes, she did. She told me that she could only work for a few minutes -- a few minutes at a time before the pain became so bad that she had to rest.

Q. Without going date-by-date, Doctor, this might be too time consuming for the Court, but would you indicate whether or not in 1960, the remaining months of 1960, you also saw the patient in connection with these injuries? A. Yes, beginning on February 4th for the first time she complained of severe headaches in the occipital

51 region and over the frontal region, where she had had this injury.

Q. And during the year 1960 -- A. Then I referred her to a neurologist, Dr. Peter Murphy.

Q. Would you look at your notes or refresh your recollection to see whether we are speaking now of '60 or '61? A. I'm sorry, '61.

Q. May I go back for just a moment now to the earlier question about the concluding months of 1960. You have testified, I believe, brought us up to around September 19th of 1960, when you saw her for pain. Do your records indicate that she was seen at other times subsequent to September 19th during 1960? A. I saw her the 19th of September, I saw her the 21st of October, the 27th of December.

Q. Were there any developments in her progress or her condition that you noted on those visits which you have not already indicated to the Court? A. Her condition during that time had remained static. There was no improvement.

Q. During the course of the year 1960 what was the history or the pattern of the swelling which you referred to? A. I don't quite understand your question, sir.

52 MR. O'DONNELL: I don't want to lead the Doctor.

THE COURT: I think he summarized it all.

MR. ARNESS: He has covered 1960, every day.

BY MR. O'DONNELL:

Q. Going, Doctor, to 1961, would you tell us when you saw the patient during the early part of 1961? A. I saw her on the 13th of

February, the 20th and the 27th of February, the 6th of March.

Q. And what were her complaints on those occasions, if any? A. Her complaints were the same as they had been. She complained of these persistent headaches, the pain in the right arm when she used it for more than a half an hour, the pain and swelling in the left leg.

Q. Dostor, when had she first complained to you of headaches?

THE COURT: You had that before, February.

THE WITNESS: The first time that she complained was the 4th of February, when she first complained of headaches.

BY MR. O'DONNELL:

Q. When she was under treatment at Sibley Hospital, were there any complaints of headaches at that time? A. Yes, they have persisted to the present time. There has been no cessation.

53 Q. And as a result of these complaints did there come a time when you referred her to any other physician for consultation or treatment? A. Yes, because of the persistency of the pains in the head and the right forearm and the left leg below the knee, I wanted to be sure that there was no nerve damage and I referred her to a neurologist.

Q. And -- A. Dr. J. Peter Murphy.

Q. And to your knowledge was she seen by Dr. Murphy? A. Yes, she was.

Q. And without revealing its contents, did Dr. Murphy send a report to you? A. He did.

Q. And subsequent to the early months of 1961, did you continue to see her for the injuries dating back to January of 1960? A. I did, at the dates that I have specified.

Q. What dates did you see her, if your records indicate, subsequent to March of 1961? A. I didn't have occasion to see her again until the 26th of June.

Q. When -- A. Then again I left town for three months and I didn't see her again until September.

54 Q. When have you last seen the patient in connection with the injuries to which you have related? A. I saw her the last time on the 4th of March this year.

Q. That is 1963? A. 1963.

Q. Would you tell us, Doctor, what her condition and what her complaints were in March of 1963? A. Well, she was still complaining of these headaches, of the swelling in her left leg and the pain in the right forearm.

Q. And what, if any, treatment is she taking at this time in connection with these matters? A. She is being sedated when it's necessary, and the constant use of analgesics, that is, pain relieving pills.

Q. Will you tell us at this time whether or not -- what is the condition of her leg? A. It is still painful. At times she has painful nodes down over the shin bone, and three times in the last three months she has had spontaneous bleeding from the left leg. Without any reason or cause the leg bleeds in the site of the incision.

Q. Doctor, you mentioned on the early examination there was
55 indication of injury to soft tissue? A. There was very wide injury to both the left leg and the right forearm.

Q. Did this injury to the soft tissue on the left leg clear up following surgery? A. Will you repeat that, please?

THE COURT: Will you read the question, Mr. Reporter.

(The last question was read by the reporter.)

THE WITNESS: It had cleared up to a degree before the surgery, but the effects of the soft tissue injury are still there.

BY MR. O'DONNELL:

Q. Has this soft tissue injury had any effect upon her recovery from the surgery? A. I'd have to go into some explanation about that. May I do so?

MR. ARNESS: I think the Doctor hasn't answered the question.

THE COURT: Yes, you may explain your answer.

THE WITNESS: In the legs there are two sets of veins. One is deep set close to the bone and the other set of veins are superficially

beneath the skin.

When it is necessary for one reason or another to remove the saphenous vein the deeper veins pick up the function of that vein and

56 in the average case satisfactory circulation is restored to the entire leg. But when there are extensive soft tissue injuries this period of time between the removal of the superficial vein and the deep vein is lengthened, and sometimes it never -- the deep circulation is never fully established to take up what has been taken away from the superficial circulation.

As a result of the soft tissue injuries Miss Stuss has not had an average result from the removal of the saphenous vein.

Both Dr. Garnett and I are at a loss to explain this spontaneous bleeding and the appearance of these painful nodes up and down the front of the shin bone.

BY MR. O'DONNELL:

Q. Doctor, directing your attention to the period prior to January 8, 1960, were you also her family physician at that time? A. Yes, sir.

Q. For what reasons did you generally have occasion to see her in the period from 1957 until January 8th of 1960? A. Well, the first time I saw Miss Stuss she had a virus pneumonitis, an upper respiratory infection.

THE COURT: Aren't we going a little too far afield?

THE WITNESS: That is not relevant at all.

57 THE COURT: Just a moment, Doctor.

MR. O'DONNELL: I can shorten this.

BY MR. O'DONNELL:

Q. Doctor, in the course of your examination and professional care of Miss Stuss, for the period from 1957 until January 8th of 1960, can you tell us what her general condition of health was during that period? A. Beauticians have to take a yearly physical examination for their license --

MR. ARNESS: I object, Your Honor. The Doctor should answer the question, not go into other areas.

THE COURT: Objection sustained.

Read the question.

(The last question was read by the reporter.)

THE COURT: Let's shorten it and simplify it. Doctor, do you know what her general state of health was prior to January 1960?

THE WITNESS: Yes; it was good. I saw her each year when she had to have her beautician's license.

BY MR. O'DONNELL:

Q. And, Doctor, during that same period, can you state whether or not she ever had any complaints of headaches? A. She never complained of headaches.

Q. Did she ever complain to you or show indication of complaints
58 regarding her arms? A. No.

THE COURT: Don't lengthen this. He said her health was good. Now, that is enough.

MR. O'DONNELL: Would the Court indulge me just a moment?

THE COURT: There is no use multiplying details. Let's move ahead.

MR. O'DONNELL: Would the Court indulge me just a moment?

THE COURT: Surely. Take whatever time you need.

(Brief pause.)

BY MR. O'DONNELL:

Q. Doctor, if you can tell us, why was it necessary to remove the saphenous vein in this case?

MR. ARNESS: I object, Your Honor. This doctor has not been qualified as a general surgeon, and the other doctor whom he called in to take care of that has testified.

THE COURT: Even if he is a general practitioner, sometimes general practitioners know an awful lot.

THE WITNESS: Thank you, sir.

THE COURT: Objection overruled.

Did you get the question?

THE WITNESS: I have the question, Your Honor, and I am afraid

59 I can't answer it. I turned this patient over to a surgeon and left it entirely to his better judgment as to what was necessary.

THE COURT: You had that from Dr. Garnett. You will have to rest on that.

MR. O'DONNELL: I only asked the question --

THE WITNESS: I would rather not answer it. I don't feel qualified.

THE COURT: Proceed.

BY MR. O'DONNELL:

Q. Doctor, can you tell us whether or not the patient, Pearle Stuss, as of this time is suffering from any permanent injuries arising out of the incident of January 8th, 1960? A. In my opinion, yes.

Q. What are these injuries? A. When a condition produced by injury has lasted as long as Miss Stuss' symptoms have and have not improved in that length of time with adequate treatment and supervision, such things must be regarded as permanent.

THE COURT: What are the permanent injuries?

THE WITNESS: The continual headaches, Your Honor, and the pain in the right forearm and in the left leg.

BY MR. O'DONNELL:

Q. Doctor, in your opinion as a physician, was the period of

60 hospitalization at Sibley Hospital in March and early April of 1960 necessary as a result of these injuries? A. It was. She was in there on my recommendation and I felt it was necessary.

Q. During this period covering the time from the 21st of March 1960 until approximately the 4th of April 1960, if charges in the amount of $434 were made by the hospital, would you say such charges were --

THE COURT: Leave that out. That is just unnecessary verbiage.

MR. O'DONNELL: Thank you, Your Honor.

THE COURT: Just put in your hospital bill.

MR. O'DONNELL: Thank you. That completes my direct examination.

THE COURT: Do you have this Doctor's bill, the witness' bill?

BY MR. O'DONNELL:

Q. What is your own bill for medical services, Doctor? A. Up until the present it's $121.

MR. O'DONNELL: Thank you, Doctor.

THE COURT: Any cross examination?

MR. ARNESS: Yes, Your Honor.

CROSS EXAMINATION

BY MR. ARNESS:

* * * * *

61 Q. * * * Now, Doctor, on January 11, 1963, this year, you recall when I came out to your office and you gave an oral deposition in this matter? A. I do.

Q. Now, up till that time and during the course of that deposition you didn't tell me anything at all about any spontaneous bleeding on Miss Stuss' leg, but afterwards you wrote me a note and told me that there had been --

* * * * *

62 Q. Is it a fact, then, that after that deposition you wrote me a letter and told me that there had been one prior occasion on which you had noticed -- in which Miss Stuss had told you there had been some bleeding? A. That is right.

Q. And since -- A. I have told you in my note that the cards had been misplaced and one card was missing.

Q. Yes. And since then, since the deposition was taken in January, has Miss Stuss told you on two other occasions that there had been some bleeding? A. Yes.

Q. All right. Now, you had not seen the first episode of bleeding, yourself; she just told you? A. I have never seen any of them.

Q. So that is what she told you? A. That is what she told me.

Q. Now, Doctor -- A. These bleedings occurred while she was at work in her parlor and I did not see them.

Q. Now, Doctor, you have your cards. I would like to just ask

63 you a couple of short questions.

You have told us about the times you saw Miss Stuss in 1960. I would like you to refer to your records and tell us if it's not a fact that after March of 1961 -- do you have that date, sir -- you only saw her two more times in 1961, that being on June 26th and on November 6th, 1961? A. I saw her the 17th of September of 1962, do you want --

Q. No, 1961, Doctor. A. 1961. I saw her in February and in June and I did not see her again until September and October of that year.

Q. Was that time in the fall of the year when she came to see you after the burglar had broken into her apartment and knocked her down? A. Yes. I don't know when that was. I have it here. Yes, on the 6th of November 1961 she had a severe blow on the right ear when a burglar broke in and knocked her down.

Q. And that is the next entry that you have after June 26th, 1961, isn't it, Doctor? A. 11th of November.

* * * * *

64 Q. Now, I want you, if you will, to begin reading on this line, where it says "June 26, 1961" and then read the rest of that card. A. "June 26, 1961 - blood pressure 120 over 80. Headaches were relieved by Bellergal. She had a dermatitis of the right elbow and the right foot. I prescribed Neocortone, one-half percent, one-half ounce."

65 Then the next one is the 11th of November, 1961. She had a severe blow on the right ear when a burglar broke in.

On September 27th, since then headaches have become worse.

Q. All right, that is fine. Now, Doctor, the dermatitis that she had that you noted there in June and the injuries she sustained in November, that had nothing to do with the accident? A. They are totally separate.

Q. All right. Now, in 1962, Doctor, did you see her at any time, other than on September 17th, with reference to the injuries she sustained in the accident of January 8, 1960? A. This is when, now?

Q. In 1962? A. Yes.

Q. When did you see her in 1962? A. September 9th, 1962, November 12th, November 26th, December 3rd.

Q. Thank you, Doctor. A. Shall I read the notations on those dates?

Q. Where are they, Doctor? A. November 12th, 1962, her blood pressure is 150 over 90, her weight was 107; the 26th, her blood pressure jumped up to 108 over 94; December 3rd the blood pressure was 140 over 80. No improvement in the headaches.

66 Q. Now, Doctor, Miss Stuss didn't have any blood pressure problems as a result of this accident, did she?

THE COURT: You are questioning the witness concerning a matter he was not questioned at all about on direct examination.

MR. ARNESS: I will withdraw the question. There is no claim for it, Your Honor.

THE COURT: Very well.

* * * * *

67 BY MR. ARNESS:

Q. Dr. Spire, I am willing to concede that you possess the necessary qualifications as a general practitioner. Do you practice as a general practitioner? A. I do.

Q. Do you feel that it is within your qualifications to trace nerve roots or to decide any nerve involvements? A. I do not. I do not have those qualifications.

* * * * *

68 Q. Yes. Now, Doctor, Miss Stuss, during this period of time that we are talking about in connection with this lawsuit, has been going through her menopausal syndrome, hasn't she? A. That is correct.

Q. And one of the common complaints that ladies have when they

have that period of life is complaints of persistent headaches, isn't that so? A. Yes, but the headaches which Miss Stuss complains of are not in any way connected with it. The location and the type of pain is entirely different. Those headaches, during the menopause, are tension headaches and the symptoms are vastly different from an occipital headache, which is not in any way related to tension.

Q. Also, a common complaint of ladies in their change of life is nervousness and neurotic complaints, isn't that so? A. Oh, yes,

69 with some of them; not always.

* * * * *

Q. Well, you do know that she has been in that cycle and is in it now, don't you? A. Mr. Arness, I have never treated Miss Stuss for that. She has never complained of it. I have never questioned it. I don't know. She has never made any specific complaints that I could tie up with her menopause. From her age, I just think that she is going through it, but I have no knowledge of it.

Q. All right. Thank you, Doctor.

* * * * *

71 PEARLE STUSS

the plaintiff herein, called to the witness stand and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. O'DONNELL:

Q. Would you keep your voice up so that His Honor and the ladies and gentlemen of the jury can hear all of your testimony, Miss Stuss, and will you identify yourself to the Court?

THE COURT: No, I don't know what you mean by identify yourself.

BY MR. O'DONNELL:

Q. You are the plaintiff in this action, Pearle Stuss?

THE COURT: No, ask her name.

72 MR. O'DONNELL: That is what I meant by it, Your Honor.

THE COURT: Well, I know.

BY MR. O'DONNELL:

Q. Would you state your name, please?

THE COURT: That is different.

A. I am Pearle Stuss.

Q. And where do you reside, Miss Stuss? A. I live at 4425 Fourteenth Street, Northwest.

Q. In a residence or in an apartment? A. Apartment house, apartment 51.

Q. And where do you work, Miss Stuss? A. I work at 4415 Fourteenth Street, Northwest, which is only next door to the apartment house.

Q. And what is your occupation? A. I am a beautician.

Q. Are you employed by someone? A. No, sir, I am employed by myself.

Q. You have your own beauty shop? A. Yes, sir.

Q. Is there anyone else who assists you in your shop? A. No, sir.

THE COURT: Where is your shop, madam?

THE WITNESS: Right next door, at 4415.

73 BY MR. O'DONNELL:

Q. And for how long have you been engaged as a beautician?

A. Well, I started in 19 -- I went to school in '33 and I started the shop in 1935.

Q. And for how long have you been engaged here in Washington, D.C., in that capacity? A. I have been here since 1941, July 1941.

Q. Directing your attention to the 8th day of January, 1960, were you operating your beauty salon on that day? A. Yes, sir.

Q. And, very briefly, in your own words, will you tell us what happened to you that day?

MR. ARNESS: I object to that, Your Honor. There is no issue.

THE COURT: Objection sustained. The liability is conceded.

MR. O'DONNELL: May I approach the bench, Your Honor.

THE COURT: No, you may not. One of the reasons for conceding liability is not to go into details and take the time of the Court and

the jury describing what happened.

MR. O'DONNELL: The circumstances under which the injuries were inflicted are related to the severity of the injury and I would like --

THE COURT: After I have ruled, if counsel wants to be heard,

74 counsel must ask leave to be heard. The Court does not argue with counsel.

MR. O'DONNELL: I didn't intend to argue, Your Honor. May I be heard on the matter?

THE COURT: You may ask her a leading direct question which would bring out the severity of the impact, that is all, but we do not want to waste time showing how the matter occurred or whether anybody was negligent because liability is admitted. Those things are important when there is a contest.

MR. O'DONNELL: Thank you, Your Honor.

BY MR. O'DONNELL:

Q. Did there come a time when you were struck by an object on the 8th of January, 1960? A. Yes, sir.

Q. Where were you at that time? A. I was coming out of the apartment house to hang the clothes on the line and --

THE COURT: We have all those facts.

How hard were you struck?

THE WITNESS: Well, I was struck hard enough so that it knocked me down against the post.

THE COURT: Now you have that.

BY MR. O'DONNELL:

75 Q. Miss Stuss, with what were you struck?

THE COURT: We have those facts. She was struck with a carton containing some trash. Now, let's move on from there.

BY MR. O'DONNELL:

Q. Miss Stuss, can you tell us, if you know, where the carton came from? A. Yes, sir.

THE COURT: Do not ask any more questions along that line.

The facts are admitted. All you have to prove is how badly she was injured.

MR. O'DONNELL: May I be heard a moment on that matter?

THE COURT: No, you may not.

MR. O'DONNELL:Can she be permitted to describe the box?

THE COURT: Beg pardon?

MR. O'DONNELL: Can she be permitted to describe the box or the height from which it fell?

THE COURT: Yes, ask direct specific questions, even if they are leading, and move along fast. One of the reasons for admitting liability is not to waste time on the facts of the accident.

BY MR. O'DONNELL:

76 Q. Can you tell us from what height the box which struck you came?

MR. ARNESS: If she saw it.

MR. O'DONNELL: Your Honor permitted me to ask a leading question.

THE COURT: Don't argue with counsel, please.

THE WITNESS: It came from the second story.

THE COURT: It is admitted it came from the second story. Please don't ask any more questions along that line.

MR. O'DONNELL: If Your Honor please, I didn't understand that it was admitted.

THE COURT: It is in the pre-trial order.

MR. ARNESS: I agree it came from the second story.

THE COURT: Why, of course.

BY MR. O'DONNELL:

Q. Would you describe the box, if you can?

THE COURT: No, we will have no description. It is all in the pre-trial order and in your summing up to the jury I will let you read the facts admitted in the pre-trial order. Do not ask any more questions along that line.

MR. O'DONNELL: Would Your Honor indulge me a moment with counsel?

THE COURT: Yes, take whatever time you need.

(Brief pause.)

77 BY MR. O'DONNELL:

Q. Will you tell the Court and jury where the box struck you?

A. Right on the top of my head.

Q. And what happened to you after the box struck you on the head?

A. Well, I fell forward and, as a result, I hit a post that was up holding a clothesline and that is what injured my arm and my leg.

Q. I show you this and ask you if you can identify it? A. Yes, sir.

THE COURT: Ask her what it is.

BY MR. O'DONNELL:

Q. What is it? A. It's a picture of the apartment house and the window where the box was thrown from.

MR. ARNESS: I object, Your Honor.

THE COURT: It has not been offered in evidence. There is nothing before the Court.

BY MR. O'DONNELL:

Q. Does the item which you have identified show the premises as they appeared on the date of January 8th, 1960?

MR. ARNESS: I object, Your Honor.

THE COURT: Objection sustained. I want counsel to come to

78 the bench.

(AT THE BENCH:)

THE COURT: Mr. O'Donnell, if you are not willing to abide by the rulings of the Court I will order a mistrial right away.

MR. O'DONNELL: I am more than willing to abide by the rulings of the Court.

THE COURT: You wasted about ten minutes trying to bring out the facts of the accident.

One of the purposes of the Court encouraging an admission of liability is to eliminate all that.

MR. O'DONNELL: I appreciate the purpose of conceding liability,

and if I am appearing to be pushing the matter too far, I only wanted the Court and the jury to have an opportunity to see the actual scene.

THE COURT: You must not be stubborn. You have got to abide by the rulings of the Court.

You will not be permitted to show to the jury as to how the accident occurred.

MR. WARD: Your Honor, may I ask a question? I think that what Mr. O'Donnell wanted to do was to show the picture of the premises to the jury as demonstrative --

THE COURT: Just a minute. I only hear one counsel at a time.

79 You will abide by the rulings of the Court. I am going to leave to the jury the question as to what the damages are. The liability is admitted, the fact that the accident occurred is admitted.

Now, I did let you bring out the fact on what part of the body she was hit, how hard she was hit and what happened to her, because that bears on the issue of damages.

MR. O'DONNELL: I will not persist any more to try Your Honor's patience, but the only reason I offered the photograph was it does show the stanchion against which she fell.

THE COURT: You will have to abide by my ruling.

(IN OPEN COURT:)

BY MR. O'DONNELL:

Q. Miss Stuss, following this incident in which you were struck on the head on January 8 of 1960, did you consult a physician? A. Yes, sir.

Q. And did you consult Dr. Spire, who testified immediately before you? A. Yes, sir.

Q. And as a result of this injury you received when you were struck on the head by this box, what complaints did you have? A. Well, my arm hurt and my leg hurt and I have continual headaches every day.

80 Q. And did you consult -- you consulted with Dr. Spire, as he testified, over the course of the years since then? A. Yes, sir.

Q. Will you tell us whether -- in what way, if any, have the injuries for which you have been treated by Dr. Spire affected you in your occupation? A. Well, I used to work an average 10 hours a day. Now I cannot work 10 hours a day because my arm hurts and my leg hurts because I have to stand on it continually. I cannot sit and do my type of work. And I have these continual headaches in back of my head, which I just have to take pain killers or otherwise I just cannot work.

Q. In the course of your actual work, aside from the time you take off from work, are you in any wise affected by the injuries you sustained in January of 1960? A. I don't understand that question, counsel. I'm sorry.

Q. Do the injuries which you sustained in 1960 in any wise impair you in performing your work? A. Yes.

Q. How? A. Well, I used to be able to stand an awful lot of work and now my nerves -- when I get these headaches I get very ner-

81 vous and, as a result, I just cannot perform like I used to. It takes me longer to perform my job. Let's say, when I give a permanent, where I used to give it in so many minutes or so many hours, it takes me longer because I am nervous, I have a headache and I cannot work as fast as I used to.

Q. At the time you were hospitalized at Sibley Hospital in March and the early part of April 1960, did you keep your beauty salon open at that time?

* * * * *

THE WITNESS: No, sir.

* * * * *

87 Q. What was your age, Miss Stuss, on January 8th of 1960?

A. Fifty-three years old. I would have been 53 on February 14th.

THE COURT: You were 52 at the time of the accident?

* * * * *

BY MR. O'DONNELL:

89 Q. What complaints do you have today which indicate back to the injury? A. Well, I don't seem to get over these headaches, and my

leg hurts every day, and if I don't take a pain killer and a nerve tablet to go to sleep I can't sleep, it aches so. It wakes me up during the night with this sharp pain in my leg, and I have questioned the doctors and none of them seem to give me the answer, but it's there.

Q. What is your physical condition today at the end of a day's work in your business, as compared to what it was prior to January 8, 1960? A. I am completely physically exhausted. My arm hurts, my leg hurts, and without a headache pill two and three times a day,

90 I cannot work.

* * * * *

CROSS EXAMINATION

BY MR. ARNESS:

* * * * *

93 Q. Now, this box that struck you, you have told us struck you on the head? A. Yes, sir.

Q. It was a cardboard box and had some papers in it, didn't it? A. Yes, sir, it had newspapers in it and a brown, like a trash package.

Q. And it was -- all right. Now, as a result of your being struck on the head and having been in this accident, the only visible signs of

94 injury you had on your body was a bruise on your right arm and a bruise on your left leg? A. Yes, sir.

* * * * *

96 Q. After the accident did you go back in your shop and finish washing Mrs. Ben English's hair before you went to the doctor?

97 A. Yes, sir, I did, because I contacted the doctor and he wasn't in his office and the secretary said he wasn't going to be in for an hour.

Q. Now, when you did see the doctor he gave you an injection or a shot in your hip, didn't he? A. That's right.

Q. And when he gave you that injection it made you black and blue, didn't it? A. Well, it did.

Q. Every time he gave you an injection after that you got black and blue, didn't you? A. I don't recall, but I probably did.

Q. Now, before you had the operation in March of 1960, the latter part of March or the first part of April, that hospitalization, is it true that you never had any swelling of the left knee or the left foot or the left ankle, before the operation? A. Yes, sir, it's true.

Q. But after the operation you did? A. Yes, sir.

Q. Now, with reference to your right arm, Miss Stuss, you do have a complete range of motion in the ability to move it in the same range that you had before the accident, don't you? A. Yes, sir.

98 Q. The difficulty that you have with your shoulder or your back, that is something that you have had for a long time that is unrelated to this accident, isn't it? A. Yes, sir.

Q. Now, you told us that you had headaches, I believe you said every day since this accident? A. Yes, sir.

Q. There hasn't been a single day when you haven't had a headache? A. Yes, sir.

Q. Did you ever have a headache before the accident? A. I may have had a headache now and then, but not one that didn't go away with an aspirin or a bufferin.

Q. Now, referring again to your deposition, on page 25, when I asked you if you had any difficulty with headaches before the accident, I said to you:

"Did you ever have any difficulty with headaches before the accident?"

You said: "Never."

I said: "Didn't you ever have a headache?"

You said: "Never, never."

99 I said: "Never had a single headache?"

You said: "No. I've only had to go to the doctor once and that was I had a bad cold and this is unbelievable and the only other time I had to see a doctor when I had to have a blood test for my license.

"Question. My specific question, the answer to my question is you never had a headache before this accident?"

You shook your head.

I said: "Never had occasion to take aspirin or bufferin?"

You said: "No, sir."

* * * * *

100 Q. Miss Stuss, I should have asked that question in this way: Were you asked those questions and did you give those answers when your deposition was taken? A. I probably did.

Q. And you were under oath at that time? A. Yes, sir.

Q. Were they true? A. Yes, sir.

Q. So that you had never had a headache and never taken aspirin or bufferin before this accident? A. Well, over a period of 53 years, I couldn't exactly remember.

101 Q. Now, when the accident happened did you strike your head when you fell? A. No, sir, I don't believe I did.

Q. Did you twist or wrench your neck in any way when you fell? A. I don't remember.

Q. Did you twist or wrench your shoulders or your back or your leg when you fell? A. I only twisted them in the course of turning around to see what hit me on the head.

Q. Well, now, calling your attention again to the deposition, on page 26 were you asked these questions and did you give these answers:

"Question. When you fell forward, either after the box struck you or after you struck the pole, did you twist or wrench your body in any way?

"Answer. No, sir.

"Question. Did your neck twist or wrench in any way?

"Answer. No, sir.

"Question. Did your arms or shoulders twist or wrench in front of you in any way?

"Answer. No, sir.

102 "Question. And your back didn't twist or wrench?

"Answer. No, sir.

"Nor did your legs?

"Answer. No, sir."

* * * * *

105 Washington, D.C.
Wed., March 20, 1963

* * * * *

106 JAMES PETER MURPHY

was called as a witness for the plaintiff and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WARD:

Q. Dr. Murphy, will you please state your full name? A. James Peter Murphy.

Q. Are you a medical doctor? A. Yes, sir.

Q. And what medical schools did you attend?

THE COURT: Do you wish to qualify the Doctor as a specialist?

MR. WARD: Yes, Your Honor.

THE COURT: In what specialty?

MR. WARD: Neurology.

THE WITNESS: Neurology and neurological surgery.

THE COURT: Will the Doctor's qualifications be conceded in these specialties?

MR. ARNESS: Yes, Your Honor, but I would like to ask a pre-

107 liminary question.

* * * * *

BY MR. WARD:

Q. Doctor, in the practice of your profession, did you have occasion to treat, examine and treat Miss Pearle Stuss? A. Yes, sir. At the request of Dr. Spire, I examined and prescribed for her on two occasions.

Q. And on what dates did you so examine and prescribe for her?

108 A. The first was February 27th, 1961, and the second occasion was September 20th, 1962.

* * * * *

(AT THE BENCH:)

MR. ARNESS: Your Honor, the authorities are quite clear that a physician who is called in to consult may not relate a history.

109 THE COURT: I know, but you wait until the history is asked for.

MR. ARNESS: Yes, of course. All right, Your Honor, I will. That is my objection. I wanted Your Honor to know my objection.

THE COURT: I thought that was it, but your objection is premature.

(IN OPEN COURT:)

* * * * *

THE WITNESS: I prescribed bellergal tablets and exercise for Miss Stuss on the first occasion I saw her, which constitutes treatment; and I did the same, recommending that they be continued on the second occasion.

THE COURT: I think the pending question is, What did the examination consist of? Is that it?

MR. WARD: That is right. What was the nature of your examination?

THE COURT: On the first occasion, I take it.

THE WITNESS: At the request of Dr. Spire, I examined her with reference to persisting complaints of residual headaches and pain in the back of the neck attributed to injury which was sustained on January 8th, 1960.

BY MR. WARD:

110 Q. Now, I wonder if I could ask you, Doctor, with the permission of the Court, to step to the board and make a drawing of Miss Stuss's back as you found it at the time you first saw her.

THE COURT: You may do so if you wish.

Now, ladies and gentlemen of the jury, if anyone should at any time have any difficulty in seeing what is being put on the blackboard, if you will raise your hand, we will readjust the position of the board so that everyone can see it.

THE WITNESS: I should state to begin with that Miss Stuss told me that she has had the curvature of the spine, which is obvious, since she was three years of age. And looking at a person who has such a curvature from the front, and with reference to the fact that her left shoulder is elevated more than her right, the spine in direct --

THE COURT: Would you draw your lines fairly heavily so that they can be seen at a distance, Doctor, please?

THE WITNESS: All right, sir. I will try to, Your Honor. This is the head, obviously. This is the neck or cervical spine. This is what is usually referred to as the back, the thoracic and lumbar spine. This is all from a front view. Now, this contrasts, of course, as you know, with the normal, which is like this. This is the curvature which
111 obviously antedated the injury which she has had according to her history for whatever reason since she was three years of age.

THE COURT: Let the Doctor resume the stand.

Now, Doctor, getting away from the illustration, what is the condition that you found? You know, you omitted that. The illustration is only helpful if we know what it illustrates. Can you describe any abnormality that you found in words?

THE WITNESS: At the time I examined her, Your Honor, her complaints were those of pain in the neck, back of the head, and of numbness of the arm. Examination revealed tenderness on the first occasion, that is, examination revealed tenderness at the insertion of the --

THE COURT: No, no. I want to know what this illustration illustrates.

THE WITNESS: It illustrates the preexistent curvature of the spine which Miss Stuss had at the time she was injured and which she still has.

THE COURT: In other words, this was not something that was a product of the injury, is that it?

THE WITNESS: No, but it renders her more susceptible to symtoms thereafter. That is the reason for emphasizing that.

THE COURT: I just wanted to clarify that.

112 THE WITNESS: No. That obviously existed since she was a child. Well, anyway, on the first occasion, to repeat, there was found tenderness on pressure over the insertion of the trapezius muscle, which is the muscle that forms the slope of the shoulder on the back of the head and where the nerve itself, which lies underneath, was also tender, this being the area in which she was complaining of headaches at that time.

On the second occasion, when she was examined on September 20th, 1962, there was, according to her report, and during the course of examination of sensation, loss of pinprick sensation on the dorsum, that is, the top of the right forearm; and there was, when the patient was asked to grip equally strongly with both hands, the grip on the right was not as strong as the one on the left. On that occasion, the second occasion, she appeared to be short of breath to me.

The complaints were those of pain in the back of the neck and back of the head, pain in the left leg, tiring and numbness of the right arm.

The findings were as described.

* * * * *

113 Q. Doctor, what was your diagnosis of Miss Stuss's complaints at the time you --

THE COURT: Not of her complaints, of her condition.

BY MR. WARD:

Q. Of her condition? A. My diagnosis was that Miss Stuss, having had a pre-existent curvature of the neck and spine, was suffering at the time of my two examinations from residual, that is, prolonged manifestations, that is, results of bruising of the nerves where they emerge from the cervical spine as a result of a head and neck injury which caused a cervical sprain and nerve root contusions, as mentioned.

THE COURT: I am not sure I follow that. There was an injury to the nerves as a result of --

THE WITNESS: Head injury which was sustained on the date referred to, January 8th, 1960.

THE COURT: Now you may proceed.

BY MR. WARD:

Q. Doctor, did you make a diagnosis of the headaches, what caused them and what the nature of these headaches were? A. The
114 diagnosis of the type of headache depends largely upon history in this as in most cases. The patient stated that she had not had headaches prior to her injury. She said that she did have headaches in an appropriate location after the injury. By appropriate, I mean, a part of the head in which pain is commonly felt as a result of a head-neck injury, the back of the head and neck. Therefore, it was my opinion that she had post traumatic headaches, that is, headaches following a head-neck injury, which are considered to be the result of nerve pinching plus some disturbance of the blood supply and which respond usually to the type of medicine which is given to someone who had, say, migraine, for example; and, therefore, I prescribed bellergal for her and also neck exercises to the arms and neck.

Q. Can you state for us from a medical standpoint why her prior deformity would render her more susceptible to symptoms? A. Well, the nerves -- can I use that diagram again, Your Honor?

THE COURT: Yes, indeed. You will find a pointer there, Doctor, that may be of aid to you.

THE WITNESS: All right, sir. Thank you. Nerves come out of the spine through little holes, from the spinal cord. This is normal
115 (indicating). This is the way they emerge from the spine. When the neck is twisted like this, each hole being between vertabrae, needless to say the holes on the side of the twisting get smaller as compared to the holes on the other side. This is exaggerated, obviously, but that is what I mean. This is the same sort of thing that you can find in yourself by going to sleep in a car with your head over one shoulder; and when you wake up, your neck, shoulder, and arm hurt. Well, this is a chronic thing, and someone who has such a spinal curvature, when you add the arthritic changes that occur in everyone as they get a little

older, naturally, that reduces the size of these holes even more. The point of all this is that when somebody has this trouble to begin with he or she is much more likely to develop symptoms as a result of a head-neck injury and to keep them there thereafter, because the nerves which supply that part of the head, neck, shoulders, and arms come out of these little holes and are more easily bruised or otherwise injured if they are already pinched to begin with by these bony changes.

THE COURT: You may proceed.

MR. WARD: Thank you.

BY MR. WARD:

Q. Now, Doctor, assuming that Miss Stuss was 53 years of age
116 on January 8th, 1960, and that she had this kyphoscoliosis which you have described for many years but she had never had any complaints of the nature that you have described prior to January 8th, 1960;

and assuming that she was struck on the head with a box of trash with sufficient force to knock her down and thereafter did have the complaints and symptoms which you have found and described, would you have an opinion as to what caused them or whether or not that striking on the head was a competent producing cause of those symptoms? A. Yes, I have an opinion.

Q. And what is that, Doctor? A. I would consider, based upon the statements just made, in the absence of these complaints prior to an injury and the development and persistence of these complaints after the injury, one would have to ascribe the complaints to the injury no matter what the status of the individual had been prior to injury. And I think a blow on the head with a box of this size referred to, and the blow being of sufficient force to knock someone to the ground, is not a trivial event and is a competent producing cause of pain in the head and neck and shoulders and arms probably as well thereafter, even in someone who is young and physically intact. And I think that the combination of such an injury, sufficiently severe to knock a person

117 down, in the presence of the preexistent spinal curvature, is a combination that one could reasonably expect to account for persistent symptoms with reference to the head and neck this long after the injury, which is three years.

Q. I have one other question, Doctor, and that is: Assuming that Miss Stuss did not recieve as a result of having been struck a cut on her head or a visible bruise, could she in your opinion still have sustained the injuries which you have described? A. You mean, could the injury have been significant and severe?

Q. That is right. A. Yes. In my opinion, it could, in spite of the fact that she did not have cuts or bruises. For example, I have seen people with broken necks who had no cuts or bruises on their head or neck as a result of the injury.

MR. WARD: I have no other questions.

THE COURT: Will counsel come to the bench?

(AT THE BENCH:)

THE COURT: Do you want to ask him whether, in his opinion, these injuries are permanent or did you purposely omit that?

MR. WARD: No, I shall ask him, and the bills, too.

118 (IN OPEN COURT:)

BY MR. WARD:

Q. Doctor, would you have an opinion concerning the permanency of these symptoms?

THE COURT: Not the symptoms.

MR. WARD: Of the injuries.

THE COURT: The condition.

BY MR. WARD:

Q. All right. Of the condition? A. No, sir. I would not be able to say that it was permanent or that it was not permanent.

THE COURT: Is the condition likely to continue for any substantial length of time?

THE WITNESS: Your Honor, one can only discuss such a condition in terms of symptoms, because she is never going to be operated on,

and nerves do not show on X-ray and in other ways; and there is no sign of anything that a milogram would reveal, for example. I think it is reasonable to assume that Miss Stuss will continue to have pain in the head, neck, and arms for an indefinite period of time, based upon history alone, to the effect that these pains were not present before the injury. If she has such symptoms now and if they persist indefinitely, one has to say that the indefinite persistence was due to the injury.

119 * * * * *

CROSS EXAMINATION

BY MR. ARNESS:

Q. Dr. Murphy, you don't know as an examining physician whether Miss Stuss has headaches today, in fact, or whether she has had them within the last year, do you? A. There is no test that will prove or disprove the presence or absence of headaches in anyone.

Q. Miss Stuss comes to you and says she has headaches and it is just her word alone that you accept in your statement that she has

120 headaches, is that correct? A. That is correct, with the addition that in a situation from which one would reasonably expect headache to occur, one is more likely to accept that statement.

Q. Now, if Miss Stuss should say tomorrow that she no longer has headaches and the next six months she doesn't have any headaches, that would enable you six months from now to say she was cured as of tomorrow, wouldn't it, Doctor? A. Cured. With reference to what?

Q. To the headache complaints. A. Well, I am sure that no one would be rash enough to say that someone who was free of headaches for six months would never have a headache again.

Q. People have headaches for reasons completely unexplained, don't they, Doctor? A. That is correct.

Q. You told us that her complaints were liable to exist for an indefinite period of time. Now if that period of time should cease tomorrow, that would be consistent with your evaluation, would it not,

Doctor? A. It would also be very interesting, and I would want to know what medicine was being taken for sure so as to use it again.

Q. Doctor, you indicated in the course of your examination that
121 the patient complained of tenderness? A. Yes.

Q. That means when you pressed on a certain area and asked her if it felt tender, she said yes? A. Yes, sir.

Q. That is a subjective symptom, isn't it, Doctor? A. Yes, that is right.

Q. And also, when you told her to grip with her two hands and you say she didn't grip as hard with her right hand, that is a subjective symptom? A. Not necessarily. It can be involuntary. That is not under the control of the individual as the weakness of a hand which is associated with a fractured wrist, or it may be voluntary, in which somebody simply doesn't exert full force even though he is asked to do so.

Q. In either of your two examinations, Doctor, did you see any sign of injury that was not subjective on Miss Stuss? A. The loss of sensation referred to as a part of the neurological examination, but the response depends upon the individual. There is no way to measure pain appreciation.

Q. Then is the answer to my question that it was all subjective? A. With the reservation just stated, that one cannot say for sure in many instances whether the grip of one hand is weaker than the other,
122 that this is involuntary or voluntary. You can't prove it.

Q. Well, now Doctor, when we use the terms subjective and objuctive, we mean by objective those things which a doctor can see and state do exist from a medical standpoint? A. And measurement of the gripping force of a hand is something that can be measured and demonstrated to the physician.

Q. I am asking you now, Doctor, for a definition of objective. Is that an accurate definition of the term objective? A. Something that can be demonstrated to a third party, yes.

Q. All right. Now, except for the grip, Miss Stuss had nothing objective in her examination, did she? A. There were no other objective findings, no, sir.

Q. Now, Miss Stuss in her condition as you have outlined it here, which you have agreed is not related to this accident in any way, was subject to spontaneous pain anyway, wasn't she? In the neck and head region? A. A person who has this type of curvature is more likely to develop spontaneous pains in the head, neck, shoulders, arms, and back than someone who does not; but one cannot predict with infallible accuracy that somebody who has such a spinal curvature will develop

123 those symptoms spontaneously. In fact, many do not.

Q. By spontaneous pain, Doctor, we mean pain that comes on for no reason at all? A. Well, no, not for no reason at all, but instead of being a result to something new being added. There is plenty of reason.

Q. I meant, Doctor, I am sorry, my question should have been, comes on for no external reason? A. External cause, right.

Q. Now, Doctor, in the examinations you performed, and I assume that you were completely thorough, you were never able to demonstrate any actual physical damage that was done to Miss Stuss in this accident of January 8th, 1960, were you? A. Assuming that the loss of sensation referred to on the dorsum, that is, the back of the arm was valid, assuming that the weakness of grip of the hand was valid, assuming that the tenderness at the point of insertion over the trapezius muscle on the back of the skull was valid, given the details of a head striking injury sufficiently severe to knock the individual to the ground, that is adequate, in my opinion, to diagnose contusion or bruising of nerve roots as I said a few minutes ago in giving the direct testimony.

124 Q. Yes, Doctor, but that depends on history, doesn't it? A. History, examination, and response or absence of response to treatment.

Q. Let me ask you this, Doctor. Without the history that you obtained from Miss Stuss, and just examining her as a physician, were you able to demonstrate any sign of physical damage to Miss Stuss that you could say was as a result of this accident? A. Well, I wouldn't say that something were a result of an accident if I didn't have a history of an accident.

THE COURT: A physician always considers history in connection with his examination, does he not?

THE WITNESS: That is correct, Your Honor. That is fifty percent.

BY MR. ARNESS:

Q. Now, Doctor, I think perhaps my question that I wanted you to answer is not clear to you. Doctor, some people have symptoms without there being any actual physical tearing or physical damage, don't they? A. Well, a symptom of any kind is always a sign of something other than normal; but, yes, many people have symptoms without objective findings of physical abnormality of the parts complained of.

125 Q. Now, all I am asking you, Doctor, isn't that what you found when you examined Miss Stuss? A. I can only just say over again what I just did, that if one assumes that the findings described are valid, and if one has the history of a head striking injury sufficiently severe to knock someone to the ground, particularly in an individual with a preexisting, susceptible to injury of the spine, then it is my opinion in this case that she did sustain contusions of nerve roots as they emerged from the cervical spine.

Q. Now, a contusion is? A. A bruise.

Q. And bruises don't persist over a long period of time, do they, Doctor, in the normal range of things? A. Bruises per se do not, but a bruised nerve, as anyone knows who has ever had a tooth worked on with a cavity in it, will continue to complain or at least be responsible for attacks of pain for an indefinite period thereafter, even though the inflammation may long have subsided.

Q. There is no indication of any inflammation or any contusion of Miss Stuss's nerves as of this date? A. You mean an active process, no, sir.

Q. So if there was a contusion, it has been resolved? A. The
126 activity of bruising is over, yes, sir, most probably.

Q. All right. So if there is anything left, it was what existed before the accident? A. No, that isn't what I said. Nerve function does not necessarily restore itself to complete normalcy after the subsidence of a bruise. For example, a nerve pinch of a ruptured disc, always even if the disc is taken out, there is some slight loss of sensation and an absence of an ankle jerk afterwards. So that because the active bruising process has disappeared, one cannot say that the function of the nerve is completely normal as it was before, if you have the findings that I referred to and if those findings are valid. The nerve has not been restored to normal.

Q. Doctor, there is no question but that the nerves aren't broken or torn in this case? A. There is no evidence of that.

Q. The contusions have healed? A. That is correct. In my opinion, the nerves themselves have never been looked at, as you know, never will be, most probably.

Q. Now, this accident didn't close up any of those holes or foramen that you told us about on the blackboard, did it? A. In my opin-
127 ion, no. It simply rendered these small holes, foramen, rendered the nerves emerging from them more susceptible, that is, more easily susceptible to trauma.

Q. More easily bruised? A. That is correct.

Q. So we are getting back to the bruise. This accident didn't aggravate the curve on this lady's spine, did it? A. I never thought about that.

Q. No indication it did, is there, Doctor? A. I don't know, because I never saw her before the accident; but I would feel there would be no reason to, except that people who have painful injuries tend to

guard themselves as they walk. Patients with cricks in the neck tend to keep their shoulder or head turned to one side. This would aggravate a curvature in that region; in other words, it could have. I don't know whether it did.

Q. There is no indication that you had that it changed in any way the curvature that you described? A. Since I did not see her prior to the injury, I could not say anything about that one way or the other.

Q. So the only thing we have been talking about that you do know is that there was a contusion and that has been healed. What else could there be, Doctor? A. What else could there be where?

128 Q. Affecting that nerve? A. Well, I think that is enough.

Q. Well, that is healed. I don't want to argue.

MR. ARNESS: I have no further questions.

THE COURT: The Doctor already said the mere fact that a contusion has healed does not mean that there are not any affects.

BY MR. ARNESS:

Q. I understand that, but the affects are not as a result of there being a contused nerve, are they, Doctor? A. In my opinion, they are, yes.

Q. What affects are there when the nerve contusion is healed? A. I can simply repeat what I just said.

THE COURT: I think you are repeating, Mr. Arness. He said that the mere fact that an injury is healed does not mean that the normal function has been restored one hundred percent.

THE WITNESS: Particularly with reference to nerves, Your Honor, which, as everyone knows, are very delicate tissues.

BY MR. ARNESS:

Q. One last question, Doctor. Whether or not there are any lin-

129 gering affects depends on how long Miss Stuss says she has headaches, isn't that correct? A. The persistence of symptoms would be a matter of her own statement, yes, sir.

Q. And no doctor can say whether she has them or she doesn't

have them, can he? A. There is no way to demonstrate symptoms on any machine or other recording device objectively.

* * * * *

(Witness excused.)

MR. WARD: Your Honor, I would like to have the hospital record identified as Plaintiff's Exhibit No. 7 and admitted into evidence.

THE COURT: You just want to have the hospital records marked for identification?

MR. WARD: To be marked for identification and formally admitted in evidence.

(Hospital records of plaintiff were marked Plaintiff's Exhibit No. 7 for Identification.)

THE COURT: You are offering it in evidence?

MR. WARD: That is right.

130 THE COURT: Any objection?

MR. ARNESS: I object to the hospital record, Your Honor. The hospital record is not admissible.

THE COURT: I am going to sustain the objection. You know, some entries in the hospital record would be admissible and some would not be. Unless there is a consent, you cannot just tender the entire file.

MR. WARD: May I address the Court on this?

THE COURT: Yes.

MR. WARD: The parties at the pretrial conference stipulated to the admission.

THE COURT: Oh, no, they did not. All they did was state that certain documents, which includes the hospital records, may be admitted without formal proof; but as is the usual practice, all substantive objections were reserved.

MR. WARD: All right.

THE COURT: Now, the way we usually proceed is for counsel to select what particular entries he wants to have in evidence; because, after all, the entire voluminous file probably would not mean very

much to a layman. You may offer those entries, and that will give the opportunity to opposing counsel either to object or not to object to those entries. May I remind you that these records can be admitted in evidence only under what is popularly known as the Federal Shop Book Rule, and that rule has been very narrowly construed in the Dis-
131 trict of Columbia circuit as being limited to routine entries.

Now, most hospital records in addition to routine entries also contain opinions and diagnoses, and so on, and they are not admissible unless the person making the diagnosis or expressing the opinion is produced for cross examination. That is the reason why we follow the other course, Mr. Ward.

MR. WARD: Your Honor, if I understand you correctly, then I would like to offer, have offered into evidence only the nurses' notes.

THE COURT: Suppose you show them to Mr. Arness and see if he objects.

MR. WARD: Thank you.

MR. ARNESS: Your Honor, I do object. I do not believe --

THE COURT: Very well, You may come to the bench, and I will rule on the objection.

(AT THE BENCH:)

THE COURT: What is the ground of your objection?

MR ARNESS: That nurses' comments are no more admissible than comments of a doctor.

THE COURT: Comments are not.

MR. ARNESS: He pointed to the remarks section, which are the
132 comments section.

THE COURT: Her handwriting is just as bad as a doctor's. She must be a very competent nurse.

Now, what is the entry to which you object. Mr. Arness?

MR. ARNESS: I object to any of the entries on this column marked remarks, which is the place where the nurse makes her opinions.

THE COURT: These are not opinions. I am going to admit the

entry, the first entry of March 23, 1960. If you want to object to the entry, "seems more comfortable," I will sustain the objection.

MR. ARNESS: I do.

THE COURT: Very well. I will sustain the objection to that. I did not think you would object to that.

"Appetite good," do you object to that?

MR. ARNESS: Your Honor, I think I have to be consistent. Some remarks say good evening, some say bad. I can't be consistent and object to one and not the other.

THE COURT: "Consistency thou art a jewel," said Hamlet, I think. On the other hand, it was Ralph Waldo Emerson who said, "A foolish consistency is the hobgoblin of little minds." So you can take your choice of either philosophy.

I cannot read this word. Can you?

133 MR. ARNESS: Moving.

THE COURT: Moving. I think up and about is an entry that is admissible. It is not a matter of opinion. That is a routine observation; but good evening or good appetite or seems more comfortable, entries of that kind, are not admissible.

I do not know what you want to bother with this for, Mr. Ward.

MR. ARNESS: What he wants, Your Honor, is the diagnosis.

THE COURT: Just what is it that you want out of this file?

MR. WARD: Here is what I want (indicating).

THE COURT: No. I am going to sustain the objection to the entries of complaints because they are not routine entries.

* * * * *

134 HAROLD C. GREEN

was called as a witness for the defendants and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ARNESS:

* * * * *

136 Q. When you dropped the box out the window, did you hear anything after that?

MR. WARD: Objection, Your Honor.

THE COURT: I think you better limit your question. I am going to sustain the objection to its present form.

BY MR. ARNESS:

Q. How long after you dropped the box out the window was it that you saw Miss Stuss? A. I didn't see her until I heard somebody holler.

Q. All right. And when you heard somebody holler, what did you do? A. I looked.

Q. And did you see her then? A. I did.

Q. Now, where were you when you saw her? A. On the second floor.

Q. A landing in the building? A. That is right.

Q. And you looked out a window? A. I looked out of the window

137 on the second floor.

Q. Was that landing between the first and second floor? A. Between the first and second.

Q. And when you looked out, what did you see of Miss Stuss? What did you observe? A. Her holding her arm.

Q. Was she lying down or was she standing up? A. She was standing up when I saw her.

Q. Did she give any indication to you when you saw her at that time or shortly thereafter that she was injured in any way other than that she held her arm?

MR. WARD: Objection. It is a leading question.

THE COURT: Objection sustained.

BY MR. ARNESS:

Q. Did you observe any signs of injury yourself, sir? A. No, I did not.

* * * * *

Q. What was the size of the box that you dropped, sir? A. I don't exactly know the size.

138 THE COURT: What is that?

THE WITNESS: It was a beer box, can beer box. The size of it I really don't remember.

BY MR. ARNESS:

Q. And will you describe its weight when you dropped it out the window? How heavy was it? A. I would say eight to ten pounds.

Q. Was this when you picked it up a heavy or light box? A. It was a light box. It had newspapers in it and a little trash.

* * * * *

139 Q. Mr. Green, did you look out as quickly as you could after you heard the sound, the voice? A. Yes, I did.

MR. ARNESS: I have no further questions, Your Honor.

THE COURT: Any cross examination?

MR. WARD: We have no cross-examination of this witness.

THE COURT: What was in the box when you dropped it?

THE WITNESS: It was a few newspapers and, you know, some papers, trash.

THE COURT: You may step down.

* * * * *

145 THE COURT: * * * Now, gentlemen, in accordance with my usual practice, I always state in my instructions to the jury what the special damages are, but I follow the practice of checking with counsel before doing that, because I do not trust my own arithmetic, besides which, I may have omitted some item.

MR. O'DONNELL: Would you excuse me while I get my notes?

THE COURT: Surely.

Now, the items of special damages that I have are: Sibley Hospital bill of $440.78; Dr. Garnett, $100; Dr. Spire, $121; Dr. James Peter Murphy, $100. That is all for the medical.

MR. WARD: $26, X-rays.

THE COURT: Yes, I omitted that.

That would make a total of medical expenses of $787.78.

146 Now, then, so far as business losses are concerned, as far as they have been proved, the way I look at it is this, gentlemen; Taking 1959 as the normal income, her loss in 1960 was in round figures, and you can only use round figures for this, $450; and her loss in 1961 was $350. * * *

* * * * *

THE COURT: * * * Now, that would make a total of special
147 damages of $1,587.78.

* * * * *

[Filed March 20, 1963]

MEMORANDUM TO THE TRIAL COURT

In the opening statement of counsel for the defendants and in the bench conference, counsel for the defendants stated that plaintiff was contending that the injury to her leg caused a varicose condition of the greater sapphenous vein of the left leg.

The plaintiff does not contend that the injury caused her to have a varicose vein. This has never been her contention and she does not now so contend.

The plaintiff's position is that she sustained a hematoma to her left leg, that her doctors decided on the surgical removal of the hematoma, that the hematoma was in the course of the vein and therefore the doctors thought the better course was to remove the vein in the process of excising the hematoma because of the location of the hematoma, and that except for the hematoma, the vein would not have been removed.

Respectfully submitted.
/s/ William T. Ward

[Filed March 20, 1963]

VERDICT AND JUDGMENT

This cause having come on for hearing on the 18th day of March, 1963, before the Court and a jury of good and lawful persons of this district, to wit:

* * * * *

who, after having been duly sworn to well and truly try the issues between Pearle Stuss, plaintiff and Preston Shelly and Mary Shelly, defendants, and after this cause is heard and given to the jury in charge, they upon their oath say this 20th day of March, 1963, that they find the issues aforesaid in favor of the plaintiff and that the money payable to him by the defendants by reason of the premises is the sum of Five thousand dollars ($5,000.00).

WHEREFORE, it is adjudged that said plaintiff recover of the said defendants the sum of Five thousand dollars ($5,000.00) together with costs.

By direction of
ALEXANDER HOLTZOFF
Judge

* * *

[Filed March 30, 1963]

MOTION FOR A NEW TRIAL

Comes now the plaintiff by her attorneys and moves the Court to set aside the verdict of the jury entered herein on the 20th day of March, 1963, in favor of the plaintiff and against the defendants and to grant a new trial and as reasons therefor states:

1. That the verdict was inadequate.

2. That harmful error was committed by counsel for the defendants in that in his opening statement he erroneously stated to the jury that the plaintiff claimed the negligence of the defendants caused her

to have a varicosed vein which required surgical removal and that he would prove that this condition was not caused by the negligence of the defendants when, in fact, this was not the claim of the plaintiff and never had been her claim.

3. That the Court committed error in refusing to permit counsel for the plaintiff to interrogate Dr. James Garnett who had surgically removed the vein of the effect of the removal of the vein on the circulatory system of the plaintiff whose occupation required her to be on her feet a great deal of time.

4. That the Court committed error in refusing to permit counsel for the plaintiff to interrogate the plaintiff on direct examination concerning the size, nature, and contents of the box that struck her and to adduce from her evidence as to her distance from the building and the location of the window in the building from which the box had been thrown, although the janitor who had been in the employ of the defendants was permitted to testify in the defendants case as to the size, nature, and contents of the box and his opinion as to its weight.

5. That the Court committed error in refusing to admit into evidence the hospital records although they were material and relevant and their admission without formal proof had been stipulated to at pre-trial.

6. And for such other and further reasons appearing on the face of the evidence or apparent of record.

Respectfully submitted,

* * *

/s/ William T. Ward
Attorney for Plaintiff

[Certificate of Service: March, 30, 1963]

[Filed April 29, 1963]

NOTICE OF APPEAL

Notice is hereby given this 29th day of April, 1963, that the plaintiff, Pearle Stuss, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the day of March, 1963 in favor of the plaintiff, Pearle Stuss, and against said defendants, Preston Shelly and Mary Shelly.

/s/ William T. Ward
Attorney for plaintiff

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BRIEF FOR APPELLEES

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,901

PEARLE STUSS,
Appellant,

v.

PRESTON SHELLY AND MARY SHELLY,
Appellees,

Appeal From the United States District Court For the District of Columbia

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Attorneys for Appellees

Of Counsel:
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WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

STATEMENT OF QUESTIONS PRESENTED

1. Did the trial court properly instruct the jury so that their resolution of the conflicting theories and conflicting facts are binding upon the parties?

2. Did the trial court properly exercise its discretion in limiting the testimony at trial to the issues of injury and damage, after appellees admitted liability?

3. Did the trial court properly exclude plaintiff's proffer of hospital record entries when it appeared the proffer was made in an improper form and after the doctors had been excused from the trial so that cross-examination was no longer practicable?

4. Under the circumstances presented in this case must this Court conclude that the $5,000 verdict in favor of appellant was inadequate?

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Appeal From the United States District Court For the District of Columbia

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BRIEF FOR APPELLEES

COUNTERSTATEMENT OF CASE

In her complaint filed August 11, 1960, appellant contended that she was injured when defendants' janitor threw a heavy box of trash from an upper story window causing it to strike her on the head and body with such force as to throw her against an upright clothes line support. (J.A. 1) She claimed that as a direct result of the negligence alleged she sustained (1) an injury to her left leg resulting in a rupture of the greater saphen-

ous vein, contusion with hematoma, pain and swelling; (2) a large contusion with hematoma over the upper two thirds of the right radius; (3) a hematoma of the head, with injury to the left supra orbital nerve; and (4) shock to her nervous and mental systems. Appellant also contended that she was required to undergo hospitalization and ". . . surgery for the removal of the injured left greater saphenous vein from the groin to the ankle and excision of the hematoma . . . ." (J.A. 2) Her initial ad damnum was $35,000. (J.A. 2)

The cause was originally pre-tried on April 13, 1962. (J.A. 5) At that time appellant apparently had abandoned the allegation that the surgery was a direct result of the negligence of the appellees, because in her pre-trial statement the injuries claimed were:

> Rupture of the greater saphenous vein of the left leg; subperiosteal hematoma of left tibia with extravasion of blood and interruption of veins; contusion with hematoma over the upper two-thirds of the right radius; hematoma of the head with injury to the left supraorbital nerve; traumatic occipital neuralgia; shock to nervous and mental system.
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> PERMANENT: Traumatic occipital neuralgia; permanent impairment of circulatory system of left leg; scars on left leg. (J.A. 5, 3-4)

In the same pre-trial proceeding the parties stipulated that hospital records may be admitted into evidence at the trial ". . . without formal proof, subject to all proper legal objections . . . ." (J.A. 6)

The pre-trial order also contained the following: "NOTE: Counsel for the P at pre-trial had no written medical evidence to sustain the claim of permanent injury but asserted he would supply such before trial to counsel for D." (J.A. 7)

At a pre-trial conference on October 19, 1962, it became apparent that appellant's counsel were claiming

more physical injury than they had previously alleged at the pre-trial proceeding. Subsequently, in November 1962, appellant filed a "Motion to Modify and Clarify Pretrial Statement and to Modify Ad Damnum Clause of Complaint." (J.A. 7) In support of this motion she claimed once again that the negligence of appellees caused injury which required the removal of the greater saphenous vein in her left leg by surgery and she moved to increase the ad damnum from $35,000 to $60,000, which application was opposed by appellees. (J.A. 11) On November 26, 1962, the court granted appellant's motion; amended the personal injury claim; and increased the ad damnum from $35,000 to $60,000. (J.A. 12)

In this posture the case came on for trial on March 18, 1963. (J.A. 14) Prior to the commencement of proceedings appellees formally admitted liability and the court announced the obvious proposition that the trial would be limited to the question of damages, stating to the jury:

> . . . the only issue that you will have to try and determine is the amount of damages that should be awarded to the plaintiff against the defendants. *I have explained to you, when you were interrogated, as to what this case is about and how it arose.* The defendant admits the facts, admits that it is liable to pay damages for such injury as the plaintiff has suffered, and the question for you to determine, and the only question, will be what amount should be awarded to the plaintiff. (Emphasis supplied.) (J.A. 15)

During the course of appellant's opening statement to the jury, the court interrupted counsel for appellant on two occasions to remind him that he need not make detailed reference to the facts of the accident. (J.A. 15-16) Apparently appellant's counsel was not willing to limit appellant's evidence to the nature and extent of her injuries and damages, because before calling the first witness he stated: "If your Honor please, I don't plan to

be extensive in asking about the accident, but I do want to just show the background from the witness." (J.A. 18) The court again advised appellant's counsel that it did not want any evidence with respect to the background but that it would permit evidence with reference to the distance and severity of impact factors. (J.A. 18)

The trial then proceeded until midway in the second day of trial, while appellant was on the stand her counsel again attempted to go into a description of the events leading up to the accident by asking the appellant the following question: "And, very briefly, in your own words, will you tell us what happened to you that day?" The trial court properly sustained appellees' objection. However it advised appellant's counsel that the court would permit a leading, direct question which would bring out the severity of the impact. (J.A. 45) When appellant's counsel persisted in his attempt to have appellant testify to the detailed circumstances of the accident, the court asked counsel to come to the bench and, out of the presence of the jury, instructed appellant's counsel that he would be required to abide by the rulings of the court. (J.A. 45-48)

Appellant complains that she was unduly restricted, even while conceding, as she must, that the trial court had the discretion to limit the trial to the issues of injury and damage. The fact is that all of the relevant circumstances did come before the jury for consideration.

The court advised the jury that appellees admitted the facts alleged by appellant and advised appellant's counsel that he was free to use the factual statements in the pre-trial order as conceded fact [1] in his presentation and

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[1] The pre-trial order stated that:

> On Jan 8, 1960, at about 10 A.M., the Plaintiff, then age 51 and single was a tenant in a building at 4425 14th St., N.W., owned by the Defendants and operated as an apartment building. On said date a janitor in the employ of the Defendants, and acting in the course of his employment, caused a

argument to the jury. (J.A. 46) In addition, the court permitted appellant's counsel to tell the jury in his opening statement that the incident in question occurred on the 8th day of January 1960 in the rear area of the building in which appellant resided (J.A. 15); when she was coming out of the apartment house to hang clothes on the line she was struck on the head and thrown against a clothes stanchion (J.A. 15-16); that she was struck so hard by a carton containing trash which was thrown from a second story window, that she was knocked down against the post (J.A. 15-16); and that she received injury to the head at the site of the impact and to the arm and leg when she was knocked against the stanchion. (J.A. 16)

During the course of the trial there was considerable evidence concerning the facts of the accident. (J.A. 19, 30, 44-48, 50, 69-70) There was testimony that the box which struck appellant was cardboard and contained newspapers and a brown trash package. (J.A. 50, 69-70) It was a beer box weighing about eight to ten pounds. (J.A. 70) In addition, each of plaintiff's three doctors were permitted to state the "history" or factual description of the accident as given him by appellant on the occasion of the first visit. (J.A. 19, 30, 54) After obtaining these full descriptions of the manner in which her injuries were sustained appellant's counsel attempted to introduce a photograph of the apartment house into evidence. (J.A. 47)

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cardboard box to be dropped from the second story of said premises into a service yard below and to the rear of said premises. PLAINTIFF CLAIMS that the carton was full of folded newspapers and that when the box was dropped it struck the Plaintiff; that at the time she was standing on the premises in the rear yard thereof hanging clothes on a clothesline provided by and retained under the control of the Defendants for the common use of the Plaintiff and other tenants; that as a result of the box striking her she was thrown against the upright clothesline support and that her injuries & damages were caused by the negligence of Defendant's employee as indicated hereinabove.

The trial court properly sustained objection and called counsel to the bench to instruct him that he was required to abide by the court's ruling. (J.A. 47)

The only visible signs of injury sustained by plaintiff in the accident on January 8, 1960, were bruises on her left leg and right forearm. (J.A. 30, 50) As a matter of fact appellant admitted that after she had been struck she went back into her job and finished washing a customer's hair before calling the doctor. (J.A. 50) When she did see her family physician, Dr. Spire, the only complaints she made were with reference to the bruises on her arm and on her leg. (J.A. 30) In March, when it appeared that the bruise on her leg was not yet resolved, she consulted a surgeon, Dr. Garnett. (J.A. 19-20, 31) At Sibley Hospital a thorough examination proved to be completely negative for injury or pathology (J.A. 23-24), except for the bruise and a congenital deformity of her back. Dr. Garnett, who questioned appellant with reference to her residual complaints on March 22, 1960 (not yet three months after the accident), stated that she had no complaints which could be attributed to the accident except the bruise on her left leg. (J.A. 24) Dr. Garnett advised a simple excision of the hematoma. (J.A. 20)

While performing that minor operation Dr. Garnett observed that his patient's greater saphenous vein showed beginning signs of the tortuous nature of a varicose vein and since "It did not substantially add to the operative procedure [he] . . . thought she might have less difficulty in the future." he stripped that vein (J.A. 25) The vein was not markedly pathological, but since the bruise was in the same area and since the patient was already under general anesthesia and the additional procedure would add very little to the operative time or the trauma to the patient, Dr. Garnett thought good medical practice indicated that the vein should be removed. (J.A. 22) He never testified that the accident which plaintiff

experienced on January 8, 1960, played any part in the minor vein pathology which he observed or in his decision to remove the vein.

In any event, appellant was up on the second day after the operation and in response to the trial court's question as to whether the removal of the hematoma or the removal of the vein was the more serious, Dr. Garnett stated: "Well they were both rather minor, actually sir. I don't think it would be too much to choose." (J.A. 21, 25) In Dr. Garnett's post operative examinations, and in another examination made shortly prior to trial, he saw no condition which he thought could reasonably be productive of pain or disability and he testified that in his opinion that there was nothing that would reasonably account for the fact that appellant continued to complain of pain in her left leg. (J.A. 26) Appellant's evidence established that Dr. Spire saw her a few times in 1960 and a few more times in the first part of 1961. (J.A. 29-35) The next entry that appears in Dr. Spire's records after June 26, 1961, is that on November 6, 1961 a burglar broke into appellant's apartment, struck her a severe blow on the right ear, and knocked her down. (J.A. 41) On November 12, 1961, according to Dr. Spire's records, appellant continued to complain of headaches. (J.A. 41-42) Dr. Spire also testified that he treated the appellant for dermatitis, which was not related to the accident, and a blood pressure problem, which was similarly unrelated. (J.A. 41-42)

There were two major disputes in the medical claims of appellant. The first was whether the operative stripping of the vein was reasonably required by the accident of January 8, 1960, and the second was whether or not appellant sustained a hematoma on the head with injury to the left supra orbital nerve, traumatic occipital neuralgia or shock to her nervous and mental systems. As previously stated, the examining physicians testified that she had no visible signs of injury on her body except on the

right arm and left leg. (J.A. 30) Appellant complained of persistent headaches, however, they could have been reasonably accounted for (1) by the severe blow delivered by the burglar in November 1961 (J.A. 41); (2) by the fact that admittedly appellant was experiencing a menopausal syndrome which brings about headaches and neurotic complaints (J.A. 42-43); or (3) by the fact that she was troubled with high blood pressure. (J.A. 42) Also appellant's headache claim was impeached because she chose to testify that she had never had a headache prior to the accident and she had never had an occasion to take an aspirin or Bufferin when her pre-trial deposition was taken (J.A. 51-52), but abandoned that strict contention at the time of trial in favor of the more plausible story that before the accident she was not troubled except by occasional headaches. (J.A. 51) Appellant was also impeached by the fact that at the trial she testified that the accident caused her to twist or wrench, whereas in her pre-trial deposition she denied any twisting or wrenching. (J.A. 52) Another questionable circumstance was that apparently appellant had advised Dr. Spire that she had experienced spontaneous bleeding on her left leg after the operation, however, the doctor admitted that he had never seen any evidence of bleeding during the course of his many examinations. (J.A. 40)

The only evidence of special damages submitted by appellant were: hospital bill—$440.78; Dr. Garnett—$100; Dr. Spire—$121; Dr. Murphy—$100; x-rays—$26; (total medical expense—$787.78); and loss of income—$800, for a total of $1,587.78. (J.A. 70-71) Upon this evidence and instructions which were far more favorable to the claim than appellant was entitled to receive, the jury returned a verdict in the amount of $5,000 which is in excess of three times the total special damage claimed and more than adequate in view of the fact that appellant's family physician testified that the only visible injuries she sustained as a result of the accident were two bruises and

appellant's operating physician characterized his operative procedure as "simple" and "minor."

SUMMARY OF ARGUMENT

Apparently appellant, who was struck by a cardboard box and sustained a bruise on her left leg, a bruise on her right forearm and other subjective complaints which could not be demonstrated by medical examination or testimony, was dissatisfied with the $5,000 verdict she received from the jury, however, she has failed to advance any substantial reason which would support a conclusion that the verdict she received was either inadequate or contrary to law. She contends that counsel for appellees accomplished an unjust result by setting up a "fiction" which easily could be disproven. However, a fair analysis of the testimony demonstrates that a jury could fairly conclude that it was appellant's claim that was fictitious. The trial court properly exercised its discretion in limiting the evidence to the issues of injury and damage after appellees admitted liability. The trial court also properly excluded appellant's attempt to introduce hospital records because appellant's proffer was improper in form. The result complained of was reached by the jury after a full and fair trial and upon the basis of instructions which were more favorable to appellant than those to which she was entitled under the law.

ARGUMENT

A. There Is No Basis for the Accusation That Counsel for Appellees Set Up a "Fiction" To Mislead Either Court Or Jury.

Appellant contends that counsel for appellees accomplished an unjust result by unfairly setting up a "fiction" which easily could be disproven. Actually appellant's claim is the "fiction" and she asserts the same erroneous impressions on this appeal that she attempted to create in

the trial court. She states on page 2 of her brief that she has a ". . . pre-existing curvature of the neck and spine." Everyone has a pre-existing curvature of the neck and spine. What appellant has is a kyphoscoliosis on the upper dorsal region, which had existed since birth and which has resulted in a considerable deformity. This condition is undoubtedly troublesome and productive of a great deal of discomfort and pain, however, it is no reason for appellant to expect a jury to give her a substantial award for the minor injuries which she sustained on January 8, 1960. It is a tribute to the jury system that the award in this case, wherein the appellees admitted liability, bore a reasonable and rational relationship to the actual special damages claimed by plaintiff.

Appellant claims that counsel for appellees told the jury ". . . that appellant claimed she was caused to have a varicosed vein requiring surgical removal as a result of the negligence of appellees. . . ." Counsel for appellees made no such statement. What he did say was that the jury would have to consider whether or not the vein which had been surgically removed was actually a varicose vein and, if a varicose vein, whether it was caused by the accident or by the nature of appellant's employment which required her to stand on her feet for long periods of time each day. If there was any confusion it stemmed from the fact that appellant's counsel attempted to claim the injury and damage which may have resulted from the removal of the vein as a proximate result of the accident, when he knew, or should have known, that the operating surgeon would not so testify. There was no ambiguity in Dr. Garnett's testimony. He stated that he intended to do a simple excision of the hematoma, but that during the course of the operation he noticed that appellant's greater saphenous vein showed signs of the tortuous nature of a varicose vein and since she was already under anesthesia and he would not be required to prolong the operation or subject her to any additional shock, he decided

to remove it. The trial court correctly concluded that the removal of the vein under those circumstances was nothing for which appellees could be held accountable.

Appellant continues to claim on this appeal that the loss of the greater saphenous vein caused a permanent impairment of her circulatory system and limitation of the use of her left leg, in spite of the fact that her operating physician testified that the remaining veins are perfectly competent to maintain normal blood circulation, and that in the course of his various post-operative physical examinations he had never seen any physical or medical condition which reasonably could be productive of continued pain or disability.

B. Appellant Was Not Unduly Restricted; and the Trial Court's Remarks Were Neither Intemperate or Unwarranted.

Appellant next contends that she was deprived of an adequate award by reason of the fact that appellees admitted liability, thereby shortening the trial and depriving her of the right to introduce background information concerning the happening of the accident. The accident was a particularly useless one in that there is absolutely no excuse for the janitor having dropped a cardboard carton out of the window on the landing between the first and second floor, certainly without first ascertaining whether there was anyone below. Appellant, however, is entitled to just compensation for injuries and damages received and she is not entitled to punitive damages from appellees.[2] The only purpose which could reasonably be served by the introduction of background information and details concerning the happening of the accident would be to dramatize the occurrence and attempt to anger the jurors so that they could not dispassionately weigh the evidence

[2] There was no claim for punitive damages and, if there had been, it would have been precluded by the authorities.

on injury and damage. As demonstrated in appellees' detailed counterstatement of case, the trial court permitted considerable latitude and most of the circumstances surrounding the accident were brought before the jury. The trial court ruled that it would permit evidence to show the distances involved and the severity of impact. (J.A. 18) When appellant attempted to introduce evidence concerning how she was struck, the manner in which she fell, and the force of the blows, there was no restriction. (J.A. 47) The court did exclude appellant's attempt to introduce photographs of the apartment house. (J.A. 47) The court did not rebuke appellant's counsel in the presence of the jury as claimed several times in appellant's brief on this appeal. (Appellant's brief pp. i, 4, 6) The discussion unfairly characterized by appellant's counsel as a rebuke occurred during a bench conference. (J.A. 47-48)

Appellant cites no authority for her proposition that the verdict and judgment must be reversed because the trial court exercised its discretion to limit the trial to the issues of injury and damage after liability was conceded. She does cite *Hayes* v. *Sutton*, 190 A.2d 655 (D.C. Ct. App. 1963) and states that it represents authority for the proposition that:

> Evidence of the circumstances surrounding the accident, especially evidence relating to the force of the impact remained relevant because it bears on the extent of appellant's injury. (Appellant's brief p. 13)

This statement is an inaccurate representation of the holding in the *Hayes* case because the court in that decision actually stated at page 656:

> Evidence of the circumstances surrounding the accident, especially evidence relating to the force of the impact, *may* remain relevant because it bears on the extent of plaintiff's injury . . . . Whether in a given case [evidence of the circumstances] . . . bears so directly . . . on plaintiff's damages, as to make evi-

> dence on this issue relevant . . . is again a determination which is best left to the *discretion* of the trial court. (Emphasis supplied.)

The cases cited by appellant in footnote 1 (appellant's brief p. 12) were taken from a collection of cases which appear in an annotation at 80 A.L.R.2d 1229-1230. Each of them involve motor vehicle accidents and situations in which the trial judge was held to have properly exercised his discretion in ruling that certain evidence of the circumstances of the accident was relevant on the issue of damages. In Section 2 of the same annotation, cases which contained exclusionary rulings are collected. In confirming the principle that the matter should be left to the trial court's discretion in the individual case, Professor Wigmore states ". . . it [evidence] may be excluded on grounds that . . . the added dramatic force that might be given from the examination of a witness is not something to which the party is entitled." IX Wigmore, Evidence, § 2591 (3d ed. 1940)

Typical of the cases in which evidence of the circumstances surrounding an accident have been held properly excluded is *Barton* v. *Miami Transit Company*, Fla. , 42 So. 2d 849 (1949), wherein the court, at page 850, stated:

> There is now and has been for a long time a deliberate effort on the part of the bench and bar to dispense with all unnecessary procedure in the determination of controversies, not only that the salient points may be made clearer, but that time may be saved in the disposition of ever mounting litigation . . . . It is not primary what the defendant did, but what he did to the plaintiffs that should be measured in money.

Although there are no factually pertinent authorities in the District of Columbia, *Dixon* v. *Great Falls & O.D. Ry.*, 43 App. D.C. 206 (1915) and *Hackaday* v. *Red Line, Inc.*, 85 U.S. App. D.C. 1, 174 F.2d 154 (1949) generally support the proposition that the trial court has an obligation

to limit the evidence at trial to the relevant issues and that the exercise of its discretion should not be disturbed unless clearly abusive.

C. Appellant's Arguments III and IV Raise No Issues for Resolution On Appeal and Were Resolved By Jury Verdict.

Appellant's arguments III and IV merely reflect a disagreement over the effect to be given Dr. Garnett's testimony. The trial court ruled that since Dr. Garnett testified that the pathology existing in appellant's greater saphenous vein was not caused by the accident and that he removed it merely as a matter of medical expediency, it was not a proper part of appellant's claim. The vein stripping procedure was obviously preventive medicine unrelated to the treatment for the injuries sustained by appellant in the accident complained of.

D. Appellant's Evidentiary Proffer With Respect To Hospital Records Was Not In Proper Form and Was, Therefore, Properly Excluded. Moreover, the Attending Physicians, Who Were Available for Cross-Examination, Were Not Asked Questions About Appellant's Hospital Course and It Was Not Prejudicial To Exclude Such Offers Later When Cross-Examination Was Impractical.

Appellant next contends that the trial court erred in refusing to receive certain hospital records into evidence. She cites no authority in support of her contention, however, it is clear that the trial court followed the required procedure in suggesting that appellant's counsel select the particular entries he wanted to have in evidence so that the court could rule on any objection that might be made. The pre-trial order specifically reserved to the parties all proper legal objections to the hospital records until the time of trial. The trial court correctly stated: "Now, most hospital records in addition to routine entries also contain opinions and diagnoses, and so on, and they are

not admissible unless the person making the diagnosis or expressing the opinion is produced for cross-examination." This statement is in accord with *Taylor* v. *New York Life Ins. Co.*, 81 U.S. App. D.C. 331, 158 F.2d 328 (1946); *Lyles* v. *United States*, 103 U.S. App. D.C. 22, 254 F.2d 725 (1957), *cert. denied* 356 U.S. 961 (1958).

Appellant did not offer anything at the time of trial except notations with reference to her own self-serving complaints and she makes no effort to demonstrate any prejudice from the trial court's ruling in her brief on this appeal. Actually there could be no prejudice because both doctors, Spire and Garnett, who treated appellant during her stay in Sibley Hospital, were called as witnesses and examined at length. If there was anything important in the hospital records, such entries could have been brought out during the course of the doctors' testimony. Failure on the part of appellant to ask the doctors about any significant portion of her course during the hospitalization, so that appellees would then have an opportunity for cross-examination, precludes her reliance on that point on this appeal.

E. Appellant Had a Full and Fair Trial; Dissatisfaction Is No Ground for Appeal.

A reading of the trial court's charge to the jury (Tr. 163-172) demonstrates that appellant's case was presented for decision in a light most favorable to her claims. The only objections made to the charge were made by counsel for appellees by reason of the court's rejection of Requested Instruction No. 1, which was to the effect that the jury was not to include in its award any damages by reason of injuries to the vein in plaintiff's leg;[3] and No. 2, which was to the effect that the jury was not to award any speculative damages. Although there was a conflict in the

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[3] The court specifically reserved this point for appellant to argue to the jury. (Tr. 145)

evidence with reference to whether appellant was knocked down, the trial court told the jury that the carton which struck her did in fact knock her down. (Tr. 166) The trial court told the jury that the defendants did not offer any medical testimony and that they, therefore, could conclude that the defendants were not in a position to contradict the claims of plaintiff's doctors. (Tr. 168-169) The trial court repeated the complaints upon which appellant offered evidence and the support given to her claim by each of her doctors (Tr. 168-171); and even though Dr. Garnett testified that there was no physical or medical condition which would account for persistent complaints, the trial court submitted the issue of permanent injury to the jury for determination. (Tr. 171) Appellant has advanced no substantive reason which would support a conclusion that the verdict she received was either inadequate or contrary to law.

CONCLUSION

For the foregoing reasons the judgment below should be affirmed.

Respectfully submitted,

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